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Welfare Administration and the Rights of Welfare Recipients

By LISE A. PEARLMAN*

A society that sacrifices the health and well-being of its [indigent] young upon the false altar of economy endangers its own future, and, indeed, its own survival.¹

— Mathew O. Tobriner

During his tenure on the California Supreme Court,² Mathew Tobriner has had the opportunity to fashion significant new law expanding the rights of the poor. In addition to writing seminal opinions in *Randone v. Appellate Department*,³ in which the court struck down California's prejudgment attachment laws as violative of the procedural due process guarantees of the state and federal constitutions, and *Green v. Superior Court*,⁴ in which the court recognized an implied warranty of habitability as a defense to an unlawful detainer action, Justice Tobriner has made a substantial contribution to the evolution of the law in the highly controversial area of welfare administration. In contrast to *Randone* and *Green*, which imposed limitations on the availability of remedies to private individuals such as creditors and landlords, the decisions treated herein involve controversies between the poor and the state, legal battles in which Justice Tobriner has emerged⁵

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1. *Cooper v. Swoap*, 11 Cal. 3d 856, 872-73, 524 P.2d 97, 107, 115 Cal. Rptr. 1, 11 (1974).

2. Justice Tobriner was elevated to the California Supreme Court from Division One of the First Appellate District on July 10, 1962, to fill the vacancy left by retiring Justice Maurice Dooling.

3. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

4. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974).

5. The year before his appointment to the California Supreme Court, Justice Tobriner had authored an opinion upholding a state regulation against a due process challenge on the ground, *inter alia*, that the recipient possessed no "vested right" to aid. *Cox v. State Social Welfare Bd.*, 193 Cal. App. 2d 708, 14 Cal. Rptr. 776 (1st Dist. 1961) (Old Age Security (OAS) applicant denied benefits for failure to exhaust

as the strongest and most steadfast advocate of the rights of the poor on the California Supreme Court.⁶

Background

Judicial articulation of the rights of the needy takes place in a legal framework that is unusual, if not unique. Present day public assistance law is the product of a complex interaction of federal and state statutes and administrative regulations. Participation by states in federally funded welfare programs is voluntary, and each state is at liberty to determine its own level of funding, but a state can qualify for receipt of federal monies only if it complies with applicable federal statutes and HEW regulations.⁷ Within each state, administrative regulations must comport with the state statutory scheme, and both the regulations and statutory provisions must be consistent with the controlling federal law.⁸ Superimposed on this structure are constitutional considerations — the preservation of fundamental rights and equal protection and due process guarantees.

Coloring the entire framework is the historical reality that the enactment and implementation of public assistance programs have been highly dependent upon the socioeconomic and political context in which they have taken shape. Until recent years, the contours of

potential resources in the form of his wife's right to apply for social security benefits). Because, as a justice on an intermediate court he was of necessity following the dictates of the state and federal supreme courts that had thus far refused to recognize any vested right to public assistance, it would be futile to attempt to divine from *Cox* the values then held by its author. *Cox* has therefore not been included in the discussion that follows.

6. This conclusion is not meant to imply that other justices had not spoken out against invidious treatment of public assistance recipients before Justice Tobriner was appointed to the supreme court. See, for example, the dissenting opinion of Justice Peters, joined by Justice Dooling in *People v. Shirley*, 55 Cal. 2d 521, 536, 360 P.2d 33, 36, 11 Cal. Rptr. 537, 540 (1961). Nonetheless, until the late sixties there was little judicial activity in this area. Justice Peters, an early advocate of the poor, sat on the court when welfare issues were first being litigated, but his death in January of 1973 prevented his participation in more than a handful of such decisions, of which he authored only one, a unanimous decision holding that plaintiffs' class of Aid to Families with Dependent Children (AFDC) recipients had stated a cause of action against the county upon allegations that the county conditioned aid to said families upon the participation of children under the age of 12 in agricultural work. *Ramos v. County of Madera*, 4 Cal. 3d 685, 484 P.2d 93, 94 Cal. Rptr. 421 (1971).

7. See *Shea v. Vialpando*, 416 U.S. 251 (1974); *Rosado v. Wyman*, 397 U.S. 397 (1970).

8. See *Conover v. Hall*, 11 Cal. 3d 842, 847-49, 523 P.2d 682, 684-85, 114 Cal. Rptr. 642, 644-45 (1974); *County of Alameda v. Carleson*, 5 Cal. 3d 730, 738-39, 488 P.2d 953, 959, 97 Cal. Rptr. 385, 391 (1971).

such programs have been molded almost exclusively by the legislative and executive branches of our government. The judiciary entered the field late, but its impact has been dramatic.

The Changing National Perspective on Poverty

Until the passage of the Economic Opportunity Act of 1964⁹ as part of President Johnson's war on poverty, the nation's poor had virtually no access to legal representation.¹⁰ This lack of effective representation was symptomatic of their plight. From its inception, the Anglo-American practice of providing public relief for the destitute has been imbued with the attitude that "beggars can't be choosers."¹¹

The principle of public responsibility for the poor was firmly established four centuries ago by the Elizabethan Poor Law.¹² Since then, public assistance programs have traditionally been locally administered¹³ with few if any guidelines, other than an overwhelming concern for minimizing the cost of the public undertaking.¹⁴ Unfortunately this has all too often operated at the expense of dehumanizing the poor.¹⁵ Throughout early American history, paupers were often treated much like criminal fugitives:¹⁶ they could be forced to wear insignia of poverty, their movement could be restricted, they could be involuntarily confined in poor houses or jails, and they could be denied the right to vote.¹⁷ In 1837 in *Mayor of New York v. Miln*,¹⁸

9. Aug. 20, 1964, P.L. 88-452, § 2, 78 Stat. 508 (codified in scattered sections of 42 U.S.C.).

10. Sitkin, *Welfare Law in California*, 1970 CAL. LAW 559, 561 (Bancroft-Whitney 1970) [hereinafter cited as *Welfare Law*].

11. See Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407, 414-42 (1966) [hereinafter cited as Bendich].

12. 43 Eliz. 1, ch. 2, § VII (1601). See tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. 1-3), 16 STAN. L. REV. (pt. 1) 257, (pt. 2) 900 (1964), 17 STAN. L. REV. (pt. 3) 614 (1965) [hereinafter cited as *California's Dual System of Family Law*].

13. See *California's Dual System of Family Law*, *supra* note 12, at 292-93.

14. *Id.* at 286-87. Until about the middle of the nineteenth century, welfare consisted primarily of various forms of poor relief administered and financed under private auspices or by cities or counties under laws that placed a vaguely defined responsibility upon the legal subdivision. Generally, there were no standards as to either content or amount of aid and no concept of right; qualification for relief rested upon complete destitution and lack of any relative to charge with support. *Id.* at 293-98.

15. See Diamond, *The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions*, 54 CALIF. L. REV. 357 (1966).

16. See Bendich, *supra* note 11, at 416.

17. *Id.* at 435 n.78.

18. 36 U.S. (11 Pet.) 102, 142 (1837).

the United States Supreme Court referred to paupers as a "moral pestilence" in upholding the right of the State of New York to exclude them from its borders. The Court did not reverse this holding and reject its prior equation of poverty with immorality until more than a century later in the landmark case of *Edwards v. California*,¹⁹ which invalidated a similar California law.

Between the last half of the nineteenth century and the Depression, a phenomenon began to appear that has been broadly characterized as the growth of "preferential assistance."²⁰ This phenomenon

was the result of a growing belief that "while the poor as a class were [to be] generally distrusted . . . some poor persons were 'worthy' in that their poverty was 'no fault of their own,' or because there seemed to be evidence that they had the capacity for 'moral regeneration' [T]he almshouse with its deterrent and punitive features would be the only recourse of all others who professed to be in need."²¹

This concept of "worthy" and "unworthy" poor has continued to have great influence on the formulation and implementation of public assistance programs, including California's present system.

The widespread unemployment of the Depression exposed the inadequacies of localized public assistance and motivated Congress to undertake the first large-scale national benefit program in American history, the Social Security Act of 1935,²² "to supplement the traditional . . . system for distributing income to certain disadvantaged persons."²³ Congress passed the Act with the clear intention that "categorical programs were to be controlled and guided primarily by local fiscal commitment rather than by concepts of need and basic entitlements"²⁴ Although the Act was not conceived as a comprehensive or integrated public welfare system,²⁵ it nevertheless represented "the sharpest break with previously existing patterns of welfare administration" that the country had ever experienced.²⁶ The

19. 314 U.S. 160 (1941).

20. Wedemeyer & Moore, *The American Welfare System*, 54 CALIF. L. REV. 326, 327 (1966) [hereinafter cited as Wedemeyer & Moore].

21. *Id.* at 327 (citing LEYENDECKER, PROBLEMS AND POLICY IN PUBLIC ASSISTANCE 46 (1955)).

22. Ch. 368, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

23. Wedemeyer & Moore, *supra* note 20, at 326.

24. *Id.* at 346.

25. *Id.* at 329.

26. *Id.* at 326. The impact of the Social Security Act of 1935 has been attributed to the fact that it marked the "entrance of the federal government into a role of continuing direct responsibility for the care of needy people" and the establishment of "the individual's immediate welfare as a matter of national concern entitled to consideration in the deployment of national resources." *Id.* at 347.

Act's imposition of conditions that the states had to meet in order to receive federal matching grants²⁷ marked a significant change in public welfare programming.²⁸

*Edwards v. California*²⁹ was decided six years after the passage of the Social Security program. Although it demonstrated the marked change in attitude of the Court in the century since the *Miln* view of paupers as a "moral pestilence,"³⁰ it by no means unequivocally assured that the Court would scrutinize and strike down other iniquitous burdens placed by states upon the poor. *Edwards* was a unanimous decision, but the justices were sharply divided on the rationale of the holding. A bare majority decided the case on the basis that California's exclusion of indigents from its borders interfered with interstate commerce.³¹ They characterized the issue as one of federal preemption rather than of individual rights. The concurring justices, on the other hand, would have invalidated the statute as an impermissible infringement of the national privileges and immunities extended to United States citizens by the fourteenth amendment.³²

The majority's commerce clause rationale did little to improve prior notions of the second-class citizenship of the poor. Although in dicta the Court approved the partial shift of responsibility for the needy from the states to the federal government that Congress sought to achieve under the Social Security Act,³³ *Edwards* reemphasized governmental preoccupation with the economic aspects of poverty relief and left untouched the notion that such relief was essentially a discretionary act of government largesse, albeit no longer purely local.

27. The Secretary of the Treasury was empowered to withhold benefits from a nonconforming state. 49 Stat. 628 (1935), 42 U.S.C. §§ 603-04 (1958). See notes 7-8 & accompanying text *supra*.

28. Such conditions have increased dramatically since the enactment of the first Social Security Act. See discussion in Wedemeyer & Moore, *supra* note 20, at 347-48.

29. 314 U.S. 160 (1941).

30. Mayor of New York v. *Miln*, 36 U.S. (11 Pet.) 102, 142 (1837). See text accompanying notes 18-20 *supra*.

31. 314 U.S. at 173-74.

32. Justices Douglas and Jackson wrote separate concurring opinions, with Justices Black and Murphy joining in Justice Douglas' concurrence. Although both concurrences would have invalidated the California statute under the privileges and immunities clause, Justice Douglas expressed no opinion as to the applicability of the commerce clause, *id.* at 177-81, while Justice Jackson completely rejected the commerce clause rationale, *id.* at 181-82.

33. "[W]e are not now called upon to determine anything other than the propriety of an attempt by a State to prohibit the transportation of indigent non-residents into its territory. The nature and extent of its obligation to afford relief to newcomers is not here involved. We do, however, suggest that the theory of the *Eliza-*

The Changing California Perspective

Until recently, recipients of public assistance in California were held to have "no vested rights" to receive aid.³⁴ Their only right was "to make application for benefits."³⁵ Even if benefits were granted, the administering agency had almost unfettered discretion to interpret benefit provisions and process applications.³⁶ Ultimately, the legislature had unquestioned power to alter or eliminate the benefits.³⁷

The traditional view of welfare benefits as charity dispensed at the discretion of local agencies did not receive widespread criticism until the mid-sixties.³⁸ Within the context of an increased awareness of individual rights in society, the concept that welfare entitlement should be a property right of the poor was articulated in a seminal article by Professor Charles Reich of Yale.³⁹ In support of this argument, Reich pointed out the ever-increasing role of the government in regulating the economy⁴⁰ and the growing recognition that the poor are mainly poor not through any failure of their own but as a result of societal forces beyond their control.⁴¹

bethan poor laws no longer fits the facts. Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. The duty to share the burden, if not wholly to assume it, has been recognized not only by State governments, but by the Federal government as well. The changed attitude is reflected in the Social Security laws under which the Federal and State governments cooperate for the care of the aged, the blind and dependent" *Id.* at 174-75.

34. *Bertch v. Social Welfare Dep't*, 45 Cal. 2d 524, 529, 289 P.2d 485, 489 (1955); *Cox v. State Social Welfare Bd.*, 193 Cal. App. 2d 708, 718, 14 Cal. Rptr. 776, 781-82 (1st Dist. 1961). Although the courts gradually shifted away from this analysis, the explicit recognition of the continued receipt of aid as a vested right did not come until the decision in *Harlow v. Carleson*, 16 Cal. 3d 731, 548 P.2d 698, 129 Cal. Rptr. 298 (1976). See notes 274-75 & accompanying text *infra*.

35. *Bertch v. Social Welfare Dep't*, 45 Cal. 2d at 529, 289 P.2d at 489.

36. See, e.g., *Cox v. State Social Welfare Bd.*, 193 Cal. App. 2d 708, 718, 14 Cal. Rptr. 776, 782 (1st Dist. 1961).

37. See *Miller, Race, Poverty, and the Law*, 54 CALIF. L. REV. 386, 396-98 (1966).

38. See, e.g., *Symposium: Law of the Poor*, 54 CALIF. L. REV. 319 (1966).

39. See Reich, *The New Property*, 73 YALE L.J. 733 (1964). But see Bendich, *supra* note 11, at 437-42, arguing for recognition of welfare benefits as a constitutional entitlement of the poor and criticizing commentators (such as Reich) who were urging the characterization of welfare benefits as "mere property rights."

40. See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255-56 (1965).

41. See, e.g., Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1359 (1963) [hereinafter cited as *Midnight Welfare Searches*]: "Social security and public assistance are the heart of the welfare state. They recognize that in a complex industrial society, individuals cannot always be 'blamed' for inability

Another scholarly trailblazer was the prolific Jacobus tenBroek.⁴² Among his contributions was a comprehensive three-part history and analysis of what he termed California's dual system of family law — the double standard under which the poor were singled out from the rest of society for invidious legal treatment.⁴³ Professor tenBroek pointed out that a distinguishing characteristic of the family law of the poor is the responsibility provisions by which specified persons are placed under a legal duty to provide financial support for their impoverished relations, which duty would not be imposed but for the fact that the persons to whom the duty is owed are destitute.⁴⁴ A prime example cited by Professor tenBroek was that, at the same time that California had a longstanding common law and civil code provision exempting a man from a duty to support the children of his wife by a former husband,⁴⁵ the Aid to Families with Dependent Children program (AFDC) imposed liability for child support upon both a stepfather and an unrelated adult male acting in the role of spouse (MARS) to an AFDC mother.⁴⁶

AFDC was the acknowledged stepchild of the American welfare system.⁴⁷ As already mentioned, the late nineteenth century was marked by the growth of preferential assistance to the "worthy." This preference was effected by piecemeal reforms in some of the less controversial public assistance programs.⁴⁸ Prior to the 1960's, organized political pressure had eliminated relative responsibility provisions in California programs for the blind and disabled and had drastically reduced them in programs for the aged.⁴⁹ For the "less worthy" poor

to support themselves, and that responsibility for individual subsistence must be widely shared. . . ."

42. Early works include: tenBroek, *California's Welfare Law — Origins and Development*, 45 CALIF. L. REV. 241 (1957); tenBroek, *The Impact of Welfare Law Upon Family Law*, 42 CALIF. L. REV. 458 (1954). Later, he wrote *California's Dual System of Family Law*, *supra* note 12, and co-authored tenBroek & Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809 (1966).

43. *California's Dual System of Family Law*, *supra* note 12.

44. *Id.* at 628. See CAL. CIV. CODE § 206 (West 1972) (liability of parents for needy adult children, and of children for needy adults).

45. CAL. CIV. CODE § 209 (West 1954) (current version at CAL. CIV. CODE § 209 (West Supp. 1977)).

46. *California's Dual System of Family Law*, *supra* note 12, at 654.

47. Wedemeyer & Moore, *supra* note 20, at 346. "So little importance was attached to [Aid to Families with Dependent Children] by the congressional framers that . . . the Chairman of the Committee on Economic Security is quoted as saying, 'Nothing would have been done on this subject if it had not been included in the report of the Committee.'" *Id.*

48. *Id.* at 326-29.

49. See *California's Dual System of Family Law*, *supra* note 12, at 633-35.

(AFDC and mentally disabled), relative responsibility provisions not only continued but expanded.⁵⁰

As the judiciary became more actively engaged in the new "era of advocacy,"⁵¹ it acquainted itself with the analyses and theories of Reich and tenBroek. Effective representation for the poor lagged several years behind scholars' exposition of their rights, however. Until the last decade, welfare issues reached the California appellate courts primarily in the context of interagency administrative disputes⁵² or criminal convictions for welfare fraud.⁵³ Rarely was a civil action brought by an applicant or recipient challenging a denial or reduction of welfare benefits.⁵⁴

The Judicial Turning Point: Close Scrutiny of Relative Responsibility Laws

In 1964 the California Supreme Court took the first major judicial step toward eradication of the iniquitous system of financing public assistance programs. In *Department of Mental Hygiene v. Kirchner*,⁵⁵ a unanimous opinion by Justice Schauer, the court held unconstitutional a statute that allowed the state to recoup from "the husband, wife, father, mother or children of a mentally ill person" the cost of supporting that person as an inmate of a state hospital.⁵⁶ The rationale of the case was somewhat muddled.⁵⁷ Apparently, the patient in this particular case had sufficient assets to pay for her confinement. The state had not sought to reach her assets, but instead had pursued the adult daughter for reimbursement. At one point, Justice Schauer spoke of the irrationality of a statute imposing

50. *Id.* at 654.

51. *Welfare Law*, *supra* note 10, at 559, quoting a 1969 press statement of the outgoing California State Welfare Director.

52. *See, e.g.*, *County of Los Angeles v. Dep't of Social Welfare*, 41 Cal. 2d 455, 260 P.2d 41 (1953); *County of Contra Costa v. Social Welfare Bd.*, 229 Cal. App. 2d 762, 40 Cal. Rptr. 605 (1964); *Merced County v. Dep't of Social Welfare*, 148 Cal. App. 2d 540, 307 P.2d 46 (1957).

53. *See, e.g.*, *People v. Owens*, 231 Cal. App. 2d 691, 42 Cal. Rptr. 153 (1965); *People v. Shirley*, 55 Cal. 2d 521, 360 P.2d 33, 11 Cal. Rptr. 537 (1961).

54. An exception was *Cox v. State Social Welfare Bd.*, 193 Cal. App. 2d 708, 14 Cal. Rptr. 776 (1961). *See* note 5 *supra*.

55. 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964), *vacated*, 380 U.S. 194 (1965), *reiterated on state grounds*, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

56. CAL. WELF. & INST. CODE § 6650 (West 1954) (repealed 1967).

57. "The court's conclusion on the central problem is . . . apocalyptic, unargued, and unexplained, leaving the conclusion to stand on its intrinsic merits and the reader to his own analysis." *California's Dual System of Family Law*, *supra* note 12, at 640.

such an obligation upon the daughter without vesting in her any right to recoup from the assets of the patient.⁵⁸ At another point he spoke more broadly of the denial of equal protection produced by the inherent arbitrariness of charging the cost of confining persons in state institutions to any one class in society if the purpose of the confinement was the protection of society as a whole.⁵⁹

The latter language regarding violation of basic equal protection guarantees was cited by Professor tenBroek when he hailed *Kirchner* as a landmark decision:

The importance of this decision cannot be overestimated; nor can the holding be confined to the relatives of the mentally irresponsible. The principle enunciated applies with equal force to the relatives of other public aid recipients. If the public assumes responsibility when mentally ill individuals are given care in state hospitals, it equally assumes responsibility when needy individuals are given public support in their own homes. That much was determined by the first revolution in welfare as long ago as 1601. Once the public has assumed the responsibility, the cost must be derived from publicly apportioned taxation. It cannot be shifted to private persons — not to relatives, nor friends, nor other arbitrarily selected persons in the community who happen to have the money.⁶⁰

Kirchner never accomplished the sweeping result that Professor tenBroek had anticipated. The court has never gone as far as his broad reading of the case suggests although, as the opinions discussed herein reveal, Justice Tobriner has steadfastly clung to the principles of *Kirchner*, reflected in Professor tenBroek's query:

In this age of a renewed quest for equality and a national rediscovery of the human and moral elements in the Constitution, should not poverty as a classifying trait be declared inherently discriminatory and outlawed because of its very nature, and "the mere fact of being without funds" be held "constitutionally an irrelevance like race, creed or color" . . . ?⁶¹

58. 60 Cal. 2d at 722, 388 P.2d at 724, 36 Cal. Rptr. at 492.

59. *Id.* at 720, 388 P.2d at 722, 36 Cal. Rptr. at 490. After the United States Supreme Court granted a petition for certiorari and vacated the decision for a determination of whether it rested on an interpretation of the federal or state constitution, *id.*, vacated and remanded, 380 U.S. 194 (1965), the California Supreme Court reaffirmed its decision on the basis of both the California and federal constitutions, *id.*, *aff'd mem.*, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965). Thus, the court firmly proclaimed itself willing to intervene to enforce the constitution "[w]here the forces moving the political branches of government [were] absent, and where even-handed justice and principles of equal treatment imperatively called for fulfillment. . . ." *California's Dual System of Family Law*, *supra* note 12, at 646.

60. *Id.* at 638-39.

61. *Id.* at 644 quoted in *Swoap v. Superior Court*, 10 Cal. 3d 490, 523-24, 516 P.2d 840, 863, 111 Cal. Rptr. 136, 159 (1973) (Tobriner, J., dissenting).

Constitutional Rights of Welfare Recipients

Justice Tobriner wholeheartedly agrees with Professor tenBroek. He has demonstrated time and time again his commitment to protection of the constitutional rights of persons receiving welfare. Although his view has not always been accepted by all of his fellow justices, as witnessed by his writing both majority and dissenting opinions, nonetheless, he has succeeded in guiding the court toward a much broader recognition of welfare recipients' rights.

Parrish v. Civil Service Commission

In 1966 the California Law Review undertook an ambitious symposium on the law of the poor for the purpose, *inter alia*, of "providing a foundation of thought, analysis, and scholarship for the use of . . . the courts in deciding cases."⁶² During this time a case assaying this new awareness of the rights of the poor was in the process of being appealed. *Parrish v. Civil Service Commission*⁶³ was an action brought by a social worker seeking reinstatement to his job after having been discharged for insubordination for declining to participate in a mass morning raid upon the homes of Alameda County welfare recipients. The raid, dubbed "Operation Bedcheck," was conducted for the ostensible purpose⁶⁴ of detecting the presence of unreported adult males in violation of former Welfare and Institutions Code section 11351. Such searches had become commonplace across the nation, proceeding under the apparent theory that persons on public assistance impliedly consented to the invasion of their bedrooms to assure the public that their taxes were not being misspent on ineligible recipients.⁶⁵

Parrish argued that the searches were illegal, thus justifying his refusal to obey the order to participate in one of them. Although the county subsequently abandoned the project and state and federal regu-

62. tenBroek, *Preface to Symposium on the Law of the Poor*, 54 CALIF. L. REV. 319, 319 (1966).

63. 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

64. The record indicated that the actual purpose, as articulated by the Alameda County director, was to provide a dramatic public demonstration of the low incidence of fraud in Alameda County by searching a random sample of recipients' homes. *Id.* at 273-74, 425 P.2d at 232, 57 Cal. Rptr. at 632.

65. See *Midnight Welfare Searches*, *supra* note 41, at 1359: "[M]ust the price of state support be the erosion of self-respect . . . ? . . . To some public officials, opening one's home to inspection evidently seems a reasonable condition to impose on those whose homes are supported by a public agency." But see *Wyman v. James*, 400 U.S. 309 (1971). See note 79 & accompanying text *infra*.

lations barred similar raids,⁶⁶ the court was nonetheless compelled to resolve the constitutionality of such mass raids in order to determine Parrish's right of refusal at the time of his dismissal.⁶⁷ Speaking for the court, Justice Tobriner stated that, although the goal of reducing welfare fraud was laudable, the manner in which the raid was carried out violated the fourth amendment to the Constitution.

First, he concluded that the applicable constitutional standards were those applied to searches for evidence of crime rather than those applied to administrative searches,⁶⁸ because misrepresentation of welfare eligibility is a crime.⁶⁹ If the government uncovers criminal evidence allegedly pursuant to a waiver of constitutional rights, the government bears a heavy burden as to the supposed waiver. Apparent consent can be vitiated by the threat of sanctions.⁷⁰ In analyzing the apparent consent secured by the searchers in "Operation Bedcheck," Justice Tobriner concluded:

The persons subjected to the instant operation confronted far more than the amorphous threat of official displeasure The request for entry by persons whom the beneficiaries knew to possess virtually unlimited power over their very livelihood posed a threat which was far more certain, immediate, and substantial. These circumstances nullify the legal effectiveness of the apparent consent secured by the Alameda County searchers.⁷¹

Second, Justice Tobriner reasoned that, regardless of whether consent for the search had been obtained, the operation was predicated on the unconstitutional assumption that the welfare agency had the power to withdraw welfare benefits from anyone who refused to consent. His analysis of this issue drew heavily upon the review of the so-called "doctrine of unconstitutional conditions" in *Bagley v. Washington Township Hospital District*.⁷² Writing for the court in that

66. DEP'T OF SOCIAL WELFARE, BULL. NO. 624, SPECIAL METHODS OF INVESTIGATION § V(B) (revised ed., effective Sept. 1, 1963); U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION §§ 2220 (item 1), 2230 (item 1) (1966).

67. 66 Cal. 2d at 262-63, 425 P.2d at 224-25, 57 Cal. Rptr. at 624-25.

68. *Id.* at 265-67, 425 P.2d at 226-28, 57 Cal. Rptr. at 626-28.

69. CAL. WELF. & INST. CODE §§ 11265, 11482 (West 1954). In *Parrish*, Justice Tobriner also refers in passing to the applicability of the general grand theft statutes, CAL. PENAL CODE §§ 484, 487 (West 1954), 66 Cal. 2d at 265, 425 P.2d at 226, 57 Cal. Rptr. at 626, which the court soon thereafter declared inapplicable to welfare fraud in *People v. Gilbert*, 1 Cal. 3d 475, 462 P.2d 580, 82 Cal. Rptr. 724 (1969). See text accompanying note 83 *infra*.

70. 66 Cal. 2d at 268-69, 425 P.2d at 228-29, 57 Cal. Rptr. at 628-29.

71. *Id.* at 270, 425 P.2d at 229-30, 57 Cal. Rptr. at 629-30.

72. *Bagley* struck down, as violative of the first amendment, CAL. GOV'T CODE

case, Justice Tobriner had declared that if the conditions appended to the enjoyment of a publicly conferred benefit require a waiver of rights secured by the Constitution, the governmental entity seeking to impose those conditions must establish:

- (1) that the conditions reasonably relate to the purposes sought by the legislation which confers the benefit;
- (2) that the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and
- (3) that there are available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.⁷³

Applying the *Bagley* test to "Operation Bedcheck," Justice Tobriner observed that the stated purpose was the detection of welfare fraud. Yet this purpose was to be accomplished by a search of homes, at least half of which were intentionally chosen at random from non-suspect welfare cases.⁷⁴ He concluded that such a poor correlation between ends and means utterly failed to meet the third criterion of *Bagley*: "[S]o striking is the disparity between the operation's declared purpose and the means employed, so broad its gratuitous reach, and so convincing the evidence that improper considerations dictated its ultimate scope, that no valid link remains between that operation and its proffered justification."⁷⁵

In analyzing the issue of unconstitutional conditions in *Parrish*, Justice Tobriner also implicitly relied on the newly articulated right to privacy established by the United States Supreme Court in *Griswold v. Connecticut*.⁷⁶ Early in the opinion, he asserted the right of privacy as a second constitutional question posed by the searches.⁷⁷ His anal-

§ 3205 (West 1966) (prohibiting political activities of public employees) (current version at CAL. GOV'T CODE § 3205 (West Supp. 1977)) and a hospital district directive to its personnel providing that employee participation in any local political activity would constitute grounds for disciplinary action or dismissal. 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).

73. *Parrish v. Civil Service Comm'n*, 66 Cal. 2d 260, 271, 425 P.2d 223, 230-31, 57 Cal. Rptr. 623, 630-31 (1967), citing *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d 499, 501-02, 505-08, 421 P.2d 409, 411, 414-16, 55 Cal. Rptr. 401, 403, 406-08 (1966).

74. 66 Cal. 2d at 272, 425 P.2d at 231, 57 Cal. Rptr. at 631.

75. *Id.*

76. 381 U.S. 479 (1965).

77. 66 Cal. 2d at 265, 425 P.2d at 226, 57 Cal. Rptr. at 626. Presumably, Justice Tobriner already considered the right of privacy of the bedroom guaranteed by *Griswold* to include unmarried, as well as married, couples, although the United States Supreme Court did not so rule until 1972 in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

ysis proceeded on the basis of traditional rights embodied in the fourth amendment and not expressly on the *Griswold* decision or the right of privacy as a separate ground for holding the searches unconstitutional. Nevertheless, he characterized the unconstitutional condition as the threatened withdrawal of benefits from anyone "who insisted upon his rights of privacy and repose."⁷⁸ These references to *Griswold* and the right of privacy and repose helped differentiate *Parrish* from the criminal context in which fourth amendment claims are most commonly raised and acknowledged that welfare recipients enjoy the right to the sanctity of their homes to the same extent as others in society.⁷⁹

In vindicating the right of recipients to be treated with the same respect for their privacy as other citizens, Justice Tobriner was not unmindful of the valid concern of the administrative agency to protect the public fisc against fraudulent applicants. Nevertheless, he concluded his opinion with this admonition to the County Welfare Department:

We fully recognize the importance of ferreting out fraud in the inexcusable garnering of welfare benefits not truly deserved. Such efforts, however, must be, and clearly can be, conducted with due regard for the constitutional rights of welfare recipients. The county welfare department itself has now abandoned the technique of investigation which it pursued here; we may thus rest assured that it will develop other more carefully conceived procedures. It is surely not beyond the competence of the department to conduct appropriate investigations without violence to human dignity and within the confines of the Constitution.⁸⁰

78. 66 Cal. 2d at 271, 425 P.2d at 230, 57 Cal. Rptr. at 630.

79. *Contra*, *Wyman v. James*, 400 U.S. 309 (1971), in which a welfare applicant unsuccessfully challenged required acquiescence in "home visits" by a welfare case-worker as a violation of fourth amendment rights. There, as in *Parrish*, the challenge was premised on the unconstitutional conditioning of AFDC benefits on consent to such visits. The majority found no fourth amendment violation on the dubious grounds that "denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. . . . There is no entry of the home and there is no search." *Id.* at 317-18. For criticism of the *Wyman* majority see Justice Douglas' dissent. *Id.* at 326. See also P. BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING 806-09 (1975).

80. 66 Cal. 2d at 276, 425 P.2d at 234, 57 Cal. Rptr. at 634. In an article relied upon by the court in *Parrish* which was addressed to the unconstitutionality of such raids, *Midnight Welfare Searches*, *supra* note 41, at 1355, Charles Reich pointed out the inadequacy of retrospective condemnation of these unconstitutional practices, noting that until 1961 there was for all practical purposes, no remedy whatsoever that could be invoked by a private individual whose home had been invaded in violation of the federal constitution. *Mapp v. Ohio*, 367 U.S. 643 (1961), changed that situation by rendering the product of an illegal search inadmissible in evidence in a criminal trial.

Although the importance of *Parrish* could be considered more symbolic than real in view of subsequent regulatory prohibitions against mass midnight raids, it did demonstrate the judiciary's willingness to take an active role in recognizing the constitutional rights of the poor. Further, by sanctioning the refusal of social workers and other state employees to carry out unlawful instructions, it afforded an additional potential safeguard to welfare recipients' rights.

People v. Gilbert

Two years after *Parrish*, Justice Tobriner wrote the opinion of the court in *People v. Gilbert*.⁸¹ In that case, a welfare mother had been convicted of the felony of fraudulently obtaining AFDC payments in violation of the general theft provision of the Penal Code.⁸² Justice Tobriner concluded that the special provisions rendering such fraud a misdemeanor under the Welfare and Institutions Code⁸³ precluded prosecution of welfare fraud under the Penal Code. This determination was consistent with the general rule of construction that if a special provision and a general provision overlap, the court is required to give

Reich posited that illegally obtained evidence of a man in the home might also be inadmissible in a hearing to revoke eligibility for welfare, but questioned the sufficiency of such a remedy for all the innocent people whose homes had been invaded. *Midnight Welfare Searches*, *supra* note 41, at 1358. In view of the unlikelihood that recipients would seek affirmative relief, Reich suggested the promulgation of federal regulations prohibiting such mass raids. *Id.* at 1359. Federal regulations were, of course, subsequently adopted. See note 66 *supra*. By upholding the caseworker's position in *Parrish*, however, the court adds another possible method for protecting welfare recipients' rights.

81. 1 Cal. 3d 475, 462 P.2d 580, 82 Cal. Rptr. 724 (1969). All seven justices concurred in the judgment, but only five concurred in the opinion. Justices Burke and McComb concurred only in the judgment. *Id.* at 485, 462 P.2d at 587, 82 Cal. Rptr. at 731.

82. CAL. PENAL CODE § 484 (West 1970). The charge underlying the defendant's conviction was that she failed to notify the welfare authorities of the presence in her home for approximately four months of an unrelated male. Again, as in *Parrish*, the statute under which the department proceeded was former CAL. WELF. & INST. CODE § 11351 (West 1966), which imposed on a nonadopting stepfather and a "man assuming the role of spouse" (MARS) an obligation to support the AFDC family with which he resided. This statutory obligation was implemented by former Department of Social Welfare Regulation 44-133.5, which conclusively presumed that all of the income of a MARS, less certain specified deductions and expenses, was available for the support of the AFDC family. That regulation is set forth in the *Gilbert* opinion, 1 Cal. 3d at 478-79 n.4, 462 P.2d at 582-83, 82 Cal. Rptr. at 726-27. A directly conflicting HEW regulation, prohibiting the assumption of the availability of income from a MARS without proof of actual contributions, was promulgated in the summer of 1968 (45 C.F.R. § 203.1, transferred to and incorporated as 45 C.F.R. 233.90(a) (1976)), following the Supreme Court decision in *King v. Smith*, 392 U.S. 309 (1968).

83. CAL. WELF. & INST. CODE § 11482 (West 1954).

effect to the special provision alone "as an exception to the general statute whether it was passed before or after such general enactment."⁸⁴

The defendant had also raised constitutional issues regarding the manner in which the Department of Social Welfare had calculated the amount of overpayment she had received.⁸⁵ On this issue some of his colleagues may have parted company with Justice Tobriner. He had prefaced his opinion with the statement that the court did not reach the constitutional issues raised by the defendant owing to its conclusion that proper construction of the statutes required reversal of her felony conviction.⁸⁶ He nevertheless addressed fully half of his opinion to the serious questions of constitutionality raised by the defendant.⁸⁷ The charge underlying her conviction was that she failed to notify the welfare authorities of the presence in her home for approximately four months of an unrelated male. Again, as in *Parrish*, the statute under which the department proceeded was former Welfare and Institutions Code section 11351, which imposed on a "man assuming the role of spouse" (MARS) an obligation to support the AFDC family with which he resided.

84. *In re Williamson*, 43 Cal. 2d 651, 654, 276 P.2d 593, 594 (1954), (quoting *People v. Breyer*, 139 Cal. App. 547, 550, 34 P.2d 1065, 1066 (1934)).

85. These very constitutional issues were then before the United States Supreme Court on appeal from the dismissal of a class action by a three-judge court in the Northern District of California. *Lewis v. Stark*, 312 F. Supp. 197 (N.D. Cal. 1968), *prob. juris. noted*, 396 U.S. 900 (1969). In addition to equal protection, due process, and right of privacy arguments, plaintiffs contended that the recently promulgated HEW regulations (see note 82 *supra*) controlled the issue of California's compliance with the Social Security Act. The three-judge court came to the opposite conclusion, finding the HEW regulation invalid and the California scheme consistent with the Social Security Act. 312 F. Supp. at 201-02. The court distinguished the recent decision of the United States Supreme Court in *King v. Smith*, 392 U.S. 309 (1968), on the grounds that the Alabama statute and regulation there in issue applied whether or not the MARS lived with the mother, whereas the California statute only dealt with a man actually "in or around the home." The Alabama scheme punished the AFDC children by rendering them ineligible for assistance based on their parent's sexual conduct, whereas the California scheme merely took the MARS' income into account in computing the grant. 312 F. Supp. at 203-04. On appeal the United States Supreme Court struck down the provisions in question but not on constitutional grounds; rather, the provisions were deemed to conflict with the controlling provisions of the Social Security Law and recently promulgated administrative regulations of the Department of Health, Education and Welfare. *Lewis v. Martin*, 397 U.S. 552 (1970). The action was reversed and remanded for a determination of whether the stepfather provisions of CAL. WELF. & INST. CODE § 11351 (West 1966) stemmed from a general obligation of support under California law which would justify the attribution of income without proof of actual contribution.

86. 1 Cal. 3d at 481, 462 P.2d at 584, 82 Cal. Rptr. at 728.

87. *Id.* at 481-84, 462 P.2d at 584-87, 82 Cal. Rptr. at 728-31.

Justice Tobriner intimated his views and presumably the views of four other members of the court regarding the constitutional challenges to this MARS provision.⁸⁸ He indicated that singling out a male friend of an AFDC recipient and placing upon him a duty of support that would not exist but for the fact that he resided with an AFDC family and that did not carry with it the concomitant benefits available to a husband under the AFDC program⁸⁹ might well constitute a denial of equal protection. He noted similarities between the MARS provision then before the court and the relative responsibility provision previously invalidated in *Department of Mental Hygiene v. Kirchner*.⁹⁰ Justice Tobriner further opined that the regulation's conclusive presumption that the MARS contributed income to the needy children with whom he resided "raises problems of procedural due process, and may not be rationally related to the basic purposes of the AFDC program."⁹¹ He discussed in a lengthy footnote the "due process" questions raised by such an irrebuttable presumption.⁹² He also treated

88. In the fall of 1969, the California MARS scheme was repealed and a revised scheme was enacted. Language in CAL. WELF. & INST. CODE § 11351 (West 1966), referring to "adult male persons assuming the role of spouse," was removed and a new provision (to be implemented by appropriate new regulations) was adopted, requiring a MARS to make a financial contribution to the AFDC family with which he resides, which contribution "shall not be less than it would cost him to provide himself with an independent living arrangement." CAL. WELF. & INST. CODE § 11351.5 (West 1972). This new scheme was upheld against constitutional attack in *Russell v. Carleson*, 36 Cal. App. 3d 334, 111 Cal. Rptr. 497 (1973). The remainder of § 11351 (referring only to the effect on AFDC grants of income of stepfathers) was repealed in 1971 in connection with the Welfare Reform Act. At the same time, the legislature enacted CAL. CIV. CODE § 5127.5 (West 1977) making a nonadoptive stepfather's income liable for the support of his wife's children to the extent of his wife's community property interest therein, less certain exemptions.

89. 1 Cal. 3d at 482-83, 462 P.2d at 585-86, 82 Cal. Rptr. at 729-30.

90. *Id.*, citing *Dep't of Mental Hygiene v. Kirchner*, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964).

91. 1 Cal. 3d at 483-84, 462 P.2d at 586, 82 Cal. Rptr. at 730.

92. *Id.* at 484 n.13, 462 P.2d at 586-87, 82 Cal. Rptr. at 730-31. This opinion was written during the period when the concept of irrebuttable presumptions was in its heyday. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972). The irrebuttable presumption actually presented a rephrased equal protection question and not a question of due process. By making a presumption irrebuttable, what the regulating body actually does is remove the issue from the adjudicative process; persons to whom the irrebuttable presumption applies are classified and treated according to the dictates of that presumption with no opportunity to challenge the underlying facts. Judicial decisions striking down irrebuttable presumptions could be recharacterized as super-legislative determinations that with respect to the particular subject of legislation rigid classification is improper. The Supreme Court abruptly abandoned the irrebuttable presumption concept in *Weinberger v. Salfi*, 422 U.S. 749 (1975). See

in a footnote⁹³ the equal protection question of whether the classification created by the MARS regulation was rationally related to the basic purposes of the AFDC program⁹⁴ and, in a final footnote, observed that new federal regulations requiring the state to abandon the questioned procedures apparently mooted the constitutional question.⁹⁵

Justice Tobriner's opinion in *Gilbert* again demonstrated his willingness "creatively [to enter] the arena of political family law."⁹⁶ In effect, through dicta, he informed the legislature and the Department of Social Welfare of the court's continuing concern for the application of constitutional principles to welfare programs and intimated that corrective procedures not only would be welcomed but were probably constitutionally mandated.

Guerrero v. Carleson

*Guerrero v. Carleson*⁹⁷ involved a due process challenge to termination notices printed in English that were sent to recipients the Department of Social Welfare knew to be fluent only in Spanish.⁹⁸ The United States Court of Appeals for the Ninth Circuit had recently rejected a similar argument in *Carmona v. Sheffield*,⁹⁹ a case in which the plaintiffs sought Spanish translation services in connection with the California unemployment program. In an opinion joined by five

the discussion in the majority opinion, 422 U.S. at 767-85, and the dissenting opinion of Justice Brennan, *id.* at 802-05.

93. 1 Cal. 3d at 484, n.14, 462 P.2d at 587, 82 Cal. Rptr. at 731.

94. A federal district court had declared a similar Alabama rule unconstitutional on the basis that the punishment of an AFDC child by withholding benefits to control his mother's immorality was not rationally related to the purposes of the AFDC program to provide assistance for needy children and families. *Smith v. King*, 277 F. Supp. 31 (N.D. Ala. 1967). On appeal, the United States Supreme Court affirmed the district court decision on statutory grounds, declining to reach the constitutional issue. 392 U.S. 309 (1968). The constitutional issue was reached, however, by Justice Douglas in his concurring opinion. *Id.* at 334. Justice Peters, dissenting in *People v. Shirley*, 55 Cal. 2d 521, 526, 360 P.2d 33, 36, 11 Cal. Rptr. 537, 540 (1961), similarly characterized the California MARS regulations as "obviously unsound." He did not expressly address the constitutional issue, however, because he would have held that the withholding of benefits by means of administrative regulation constituted a void usurpation of legislative power. *Id.* at 527, 360 P.2d at 36, 11 Cal. Rptr. at 540.

95. 1 Cal. 3d at 485 n.15, 462 P.2d at 587, 82 Cal. Rptr. at 731.

96. *California's Dual System of Family Law*, *supra* note 12, at 646.

97. 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973).

98. The plaintiffs' ability to understand only Spanish was clearly marked on their files.

99. 475 F.2d 738 (9th Cir. 1973).

other justices, Justice Mosk acknowledged the desirability of providing a welfare termination notice in Spanish but concluded that "it does not rise to the level of a constitutional imperative."¹⁰⁰

Justice Tobriner dissented. Relying on *Mullane v. Central Hanover Bank & Trust Co.*¹⁰¹ and *Goldberg v. Kelly*,¹⁰² he asserted that as a matter of procedural due process the recipients were entitled to notice reasonably calculated to advise them of the action taken regarding their unemployment benefits and to an opportunity to present their objections. Noting that a recipient must request a hearing within fifteen days of termination and further commenting on the life-and-death aspects of welfare relief,¹⁰³ Justice Tobriner stated that, on the question of adequacy of the termination notices, the balance must be struck in favor of the recipients. On the one hand, the Department had already been printing some forms in Spanish, so it would appear that the burden of also printing termination notices in Spanish would be slight.¹⁰⁴ On the other hand, if the recipients could not get the notices interpreted in time to assert their right to a hearing, they would be subjected to a "crucial" loss.¹⁰⁵ With readily available translation capability, timely and adequate notice as required in *Goldberg* and *Mullane* was clearly not met by notification in English to persons known to understand only Spanish.

The majority expressed concern that a favorable ruling would require the state to conduct all its affairs in every language that is spoken by persons under its jurisdiction. Justice Tobriner responded that this "parade of horrors" could be easily avoided by balancing the expense and inconvenience to the state of printing notice in foreign languages against the burden otherwise resulting to the non-English speaking individuals with whom the state was communicating, taking into account the number of persons fluent only in a particular non-English language and the deprivation that would result if translation services were not provided.¹⁰⁶ In conclusion, Justice Tobriner regretted that

100. 9 Cal. 3d 809, 512 P.2d 833, 109 Cal. Rptr. 201 (1973). But see *Castro v. State*, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970), declaring the California constitutional provision conditioning voting rights upon ability to read and write English violative of the fourteenth amendment.

101. 339 U.S. 306 (1950).

102. 397 U.S. 254 (1970).

103. 9 Cal. 3d at 820-21, 512 P.2d at 841-42, 109 Cal. Rptr. at 209-10.

104. *Id.* at 820, 512 P.2d at 841, 109 Cal. Rptr. at 209.

105. *Id.* at 821, 512 P.2d at 841, 109 Cal. Rptr. at 209.

106. *Id.* at 821-22, 512 P.2d at 841-43, 109 Cal. Rptr. at 209-11.

"[i]n the long effort of the subgroups in our culture to attain recognition and participation the majority opinion can only be an unfortunate step backwards."¹⁰⁷

Nonetheless, the majority's wish to avoid a constitutional ruling that would require a case-by-case analysis of whether a notice printed in English was sufficient to apprise the recipient of the action taken is understandable. The majority clearly sympathized with the plight of wrongfully terminated, non-English-speaking recipients who did not realize their right to a hearing in time to assert it, but had difficulty elevating the demand for translation to a due process guarantee.¹⁰⁸

Later that year the legislature took the hint and passed the Dynamally-Alatorre Bilingual Services Act,¹⁰⁹ which specifically declared:

[T]he effective maintenance and development of a free and democratic society depends on the right and ability of its citizens and residents to communicate with their government and the right and ability of the government to communicate with them.

....

It is the intention of the legislature in enacting this chapter to provide for effective communication between all levels of government in this state and the people of this state who are precluded from utilizing public services because of language barriers.¹¹⁰

The Act requires all state and local public agencies serving a substantial number of non-English-speaking people to "employ a sufficient number of qualified bilingual persons" to ensure provision of information and services "in the language of the non-English-speaking person."¹¹¹ It further requires any materials explaining available services to "be translated into any non-English language spoken by a substantial number of the public served by the agency."¹¹² What

107. *Id.* at 823, 512 P.2d at 843, 107 Cal. Rptr. at 211. See Comment, "*Citado a Comparecer*": Language Barriers and Due Process — Is Mailed Notice in English Constitutionally Sufficient? 61 CALIF. L. REV. 1395 (1973). After a thoughtful analysis of all aspects of the constitutional issue raised by the language barrier, the author comes to the same conclusion as does Justice Tobriner, that the "zealously guarded" due process guarantee of the right to receive effective notice includes foreign language notice "[w]hen the serving party is aware that English-language notice will not be understood, and when translation services are readily available at low cost." *Id.* at 1421.

108. 9 Cal. 3d 817, 512 P.2d 839, 109 Cal. Rptr. 207.

109. 1973 Cal. Stats., ch. 1182 § 1 (codified at CAL. GOV'T CODE §§ 7290-99 (West Supp. 1977)).

110. CAL. GOV'T CODE § 7291 (West Supp. 1977).

111. *Id.* §§ 7292, 7293.

112. *Id.* § 7295.

constitutes a substantial number and how many translators are sufficient are determinations delegated to the particular agencies.¹¹³

The very breadth of the Dymally-Alatorre Bilingual Services Act demonstrates the desirability of imposing translation requirements through the legislature and not through the courts, especially because effectuation of the policy of ensuring notice to non-English-speaking persons requires the cooperation of the agencies involved. Nevertheless, the passage of that Act was a moral victory for Justice Tobriner, one that a dissenter rarely achieves so quickly.

Fiscal Politics and Principled Judicial Decisionmaking

In 1969 constitutional and statutory challenges to state welfare programs were just beginning to reach the United States Supreme Court. Soon after Alabama's MARS income attribution provisions were declared incompatible with the controlling HEW regulation in *King v. Smith*,¹¹⁴ the high court in *Lewis v. Martin*¹¹⁵ also invalidated California's MARS income provisions. Between *King* and *Lewis* the United States Supreme Court decided the landmark case of *Shapiro v. Thompson*,¹¹⁶ a six-to-three decision striking down, as violative of the right to travel, statutory provisions of three jurisdictions¹¹⁷ that imposed one-year residency requirements on applicants for welfare assistance. The Court rejected the argument that public assistance benefits are a "privilege" and not a "right"¹¹⁸ and also rejected as a "compelling interest" preservation of the fiscal integrity of state public assistance programs.¹¹⁹ Logically extended, *Shapiro* could have revolutionized the American welfare system. As Justice Harlan observed in dissent, Justice Brennan's opinion included the "cryptic suggestion that the 'compelling interest' test is applicable merely because the result of the classification may be to deny the appellees 'food, shelter and other necessities of life'"¹²⁰

113. *Id.* §§ 7292, 7293, 7295.

114. 392 U.S. 309 (1968).

115. 397 U.S. 552 (1970). Both *Lewis* and *King* rested on the ground that the federal regulations permitted deductions from AFDC grants only for income actually received, whereas the states were impermissibly reducing AFDC grants based merely on presumed income.

116. 394 U.S. 618 (1969).

117. Connecticut, Pennsylvania, and Washington, D.C.

118. 394 U.S. at 627 n.6.

119. *Id.* at 627-28, 633.

120. *Id.* at 661 (citation omitted), referring to majority opinion at 627. This suggestion was made explicit in Justice Marshall's dissent, joined by Justice Brennan,

Justice Brennan again wrote for the majority in *Goldberg v. Kelly*,¹²¹ which mandated notice and a hearing prior to termination of public assistance. In reaching that decision the Court acknowledged Professor Charles Reich's formulation of the concept of welfare entitlement as a property right of the poor.¹²²

These decisions seemed to establish a constitutional standard of strict judicial scrutiny of legislation that affects welfare recipients. In 1970, with the advent of the Burger Court, there was a marked retreat from the principles of constitutional analysis suggested in *Shapiro* and *Goldberg*. The new position of the Court was manifested in *Dandridge v. Williams*,¹²³ in which state welfare programs were equated with traditional state economic regulation;¹²⁴ the Court thus reverted to an equal protection standard of minimum rationality to uphold Maryland's maximum AFDC grant against a constitutional challenge.

Not long after Warren Burger succeeded Chief Justice Warren on the United States Supreme Court, Governor Reagan appointed Donald Wright to replace retiring Chief Justice Traynor on the California high court.¹²⁵ The governor apparently hoped to duplicate on the state level the conservative shift achieved by the Nixon appointments to the United States Supreme Court. The new Chief Justice was soon to disappoint the governor.¹²⁶ One of the first welfare decisions in which Chief Justice Wright would participate was the unanimous decision in *County of San Mateo v. Boss*,¹²⁷ which applied the principle articulated in *Kirchner* in holding unconstitutional welfare provisions requiring adult children of recipients of aid to the aged to reimburse the state.

This controversial decision provoked immediate action by the legislature, which came up for review by the California Supreme Court

in *Dandridge v. Williams*, 397 U.S. 471, 522 (1970): "[w]hen a benefit . . . is necessary to sustain life, stricter constitutional standards . . . are applied"

121. 397 U.S. 254 (1970). *Wheeler v. Montgomery*, 397 U.S. 280 (1970), decided together with *Goldberg v. Kelly*, dealing with California's failure to provide pretermination hearings.

122. 397 U.S. at 262 n.8.

123. 397 U.S. 471 (1970).

124. *Id.* at 484.

125. Chief Justice Wright was appointed on April 6, 1970. Governor Reagan announced the appointment by saying, "It is my fervent hope that under Justice Wright's able leadership, the court will return to a policy of judicial restraint." 88 THE RECORDER 66, April 7, 1970, at 1, col. 6.

126. See 102 THE RECORDER 22, Feb. 1, 1977, at 1, col. 3.

127. 3 Cal. 3d 962, 479 P.2d 654, 92 Cal. Rptr. 294 (1971).

in *Swoap v. Superior Court*.¹²⁸ All of the justices but Tobriner and Mosk were convinced that the new legislative provisions had effectively overruled *Boss*. Until this 1973 disagreement over the issues in *Swoap*, the court had been invalidating discriminatory governmental acts against the poor with unanimity.¹²⁹

Mooney v. Pickett

Although the discussion of constitutional rights in the early Tobriner opinion in *Parrish* and the dicta of *Gilbert* were reassuring to welfare recipients and their advocates, neither opinion had had much direct impact on the administration of welfare in California because the procedures subjected to constitutional challenge had already been forbidden by federal regulations by the time the decisions were handed down.¹³⁰ In contrast, Justice Tobriner's opinion in *Mooney v. Pickett*¹³¹ had considerable impact because it affected the current practice in at least thirteen counties. These counties had reduced their welfare rolls by excluding "employable" single men from nonemergency general assistance payments.¹³²

Mooney, a unanimous decision, was a class action challenging a San Mateo county regulation that stated that "[g]enerally speaking,

128. 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973).

129. Until 1973, the California Court's difficulty had been created in cases where the new Nixon majority on the United States Supreme Court interpreted provisions of the Social Security Act in a manner contrary to previous rulings which had been relied upon by the California court in reaching its decisions. See, e.g., *Villa v. Hall*, 6 Cal. 3d 227, 490 P.2d 1148, 98 Cal. Rptr. 460 (1971) vacated and remanded in light of *Jefferson v. Hackney*, 406 U.S. 535 (1972), 406 U.S. 965 (1972).

130. For regulations mooted the constitutional issue posed by the mass raids in *Parrish*, see note 68 *supra*. See *People v. Gilbert*, 1 Cal. 3d 475, 485 n.15, 462 P.2d 580, 587, 82 Cal. Rptr. 724, 731, for a discussion of federal regulations subsequently interpreted by the Supreme Court in *Lewis v. Martin*, 397 U.S. 552 (1970) as mooted the constitutional question raised therein.

131. 4 Cal. 3d 669, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971).

132. Another case which had some concrete effect was *California Welfare Rights Organization v. Carleson*, 4 Cal. 3d 445, 482 P.2d 670, 93 Cal. Rptr. 758 (1971), decided just prior to *Mooney*, which required the state to implement federally mandated cost of living increases. The impact of that case (a unanimous opinion by Justice Burke invalidating emergency regulations that, *inter alia*, effectuated without legislative authorization a percentage reduction of AFDC grants to offset the cost of living increases mandated by federal law) was, however, only to help precipitate the inevitable. Justice Burke noted that, while the United States Supreme Court in *Rosado v. Wyman*, 397 U.S. 397 (1970) contemplated that state legislatures could nullify the mandated cost of living increases by percentage reduction of grants, 4 Cal. 3d at 451, 482 P.2d at 674, 93 Cal. Rptr. at 762, this holding in no way legitimated an administrative attempt to accomplish that result without statutory authorization. *Id.* at 458-59, 482 P.2d at 680, 93 Cal. Rptr. at 768.

employable persons are not eligible for General Assistance. . . . Assistance will be granted to employable adults only in emergencies.”¹³³ Justice Tobriner’s opinion held that this regulation violated the mandate of Welfare and Institutions Code section 17000, requiring every county to relieve and support all incompetent, poor, and indigent persons. Citing *Goldberg v. Kelley*, Justice Tobriner wrote that the issue presented by the case was one of great public concern and importance because the challenged rule could deny many residents of the various counties having such regulations “the means to obtain essential food, clothing, housing and medical care.”¹³⁴ He analyzed the relevant provisions of the Welfare and Institutions Code and found references to recipients who might be neither unemployable nor incompetent.¹³⁵ He then examined the legislative history of the statutory provisions in question. Concluding that employable indigents had been included historically by the legislature, he determined that the obligation imposed on the counties by the currently applicable legislation was a mandatory duty, rather than a discretionary directive, to furnish aid to all eligible indigents.¹³⁶ The statutory provision,¹³⁷ which provides that each county may establish standards of eligibility for general assistance, did not give a county authority arbitrarily to exclude a class of otherwise qualified applicants or to impose standards of eligibility in conflict with the objectives of the enabling legislation. In delineating the discretion which counties were permitted to exercise, Justice Tobriner relied on Government Code section 11374. That section provides that when a statute confers upon a state agency the authority to adopt regulations to implement, interpret, make specific or otherwise carry out statutory provisions, the agency’s regulations must be “consistent and not in conflict with the statute,” and reasonably necessary to effectuate its purpose.

The county had argued in defense of its employable man rule that “employability” was an economic resource which other indigents did not have. Justice Tobriner readily dismissed this sophistic argument because the term “employability” as used by the county merely denoted that a man was physically and mentally fit for work; it did not signify that a job awaited him.¹³⁸

133. DEP’T OF SOCIAL SERVICES, SAN MATEO COUNTY, CAL., *Manual of Policies and Procedures*, Reg. GA-08 (1969).

134. 4 Cal. 3d at 675, 483 P.2d at 1234, 94 Cal. Rptr. at 282.

135. *Id.* at 676, 483 P.2d at 1235-36, 94 Cal. Rptr. at 283-84.

136. *Id.* at 678, 483 P.2d at 1237, 94 Cal. Rptr. at 285.

137. CAL. WELF. & INST. CODE § 17001 (West 1972).

138. 4 Cal. 3d at 679-80 n.12, 483 P.2d at 1238, 94 Cal. Rptr. at 286.

To the man who cannot obtain employment his theoretical employability is a barren resource; it is inedible; it provides neither shelter nor any other necessity of life. Until he can get a job, he does not differ in economic resources from the man whose unemployment stems from more personal disabilities.¹³⁹

A more telling argument advanced by the county was that it could simply not afford to extend general assistance to employable persons; the county estimated that the abolition of the employable single man rule would double the cost of general assistance.¹⁴⁰ The very real problems of the limited financial capabilities of local, state, and federal governments were a practical consideration to which the courts were not blind.¹⁴¹ Nevertheless, if the cost of welfare were accepted as a justification for every action taken by an administrative agency, then public assistance benefits would be truly a discretionary charity with few, if any, constitutional protections for recipients.¹⁴² Justice Tobriner's response to the county's argument was the only position that could be taken, consistent with principled judicial decisionmaking:

We are aware of the financial difficulties which attend present welfare programs on local, state, and national levels. This court, however, is not fitted to write a new welfare law for the State of California, and while the Legislature addresses itself to that task it remains our task to enforce the existing law. We observe that the county retains extensive authority to establish standards for General Assistance, both as to eligibility and as to amount of aid. In view of this discretion, the county can surely find many ways which do not violate state statute [*sic*] which it can limit General Assistance payments to the financial resources available.¹⁴³

Mooney recognized that so-called employable persons are just as deserving of the basic necessities of life as unemployable indigents. Further, it cautioned counties and administrative agencies to observe their duty faithfully to implement the laws passed by the state legislature. The court asserted its willingness to act as a watchdog to ensure that this duty was being met.¹⁴⁴

139. *Id.* at 680, 483 P.2d at 1238, 94 Cal. Rptr. at 286.

140. *Id.*

141. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Morris v. Williams, 67 Cal. 2d 733, 433 P.2d 697, 63 Cal. Rptr. 689 (1967).

142. *See* Shapiro v. Thompson, 394 U.S. 618, 633 (1969). *But see* Dandridge v. Williams, 397 U.S. 471 (1970).

143. 4 Cal. 3d at 680, 483 P.2d at 1238, 94 Cal. Rptr. at 286.

144. In *Roberts v. Brian*, 6 Cal. 3d 1, 489 P.2d 1378, 98 Cal. Rptr. 50 (1971), Justice Tobriner again wrote a unanimous opinion for the court, demonstrating the contrast between the flexible approach of the court and the rigid approach of the administering state agency in regard to meeting the needs of the individual recipients of public assistance in a unique but tragic situation. The petitioner suffered from

The attempt of the counties to limit their welfare rolls by distinguishing between deserving and undeserving poor based on their potential to obtain unavailable employment paralleled the distinctions then being drawn by Governor Reagan's administration during the negotiation of the Welfare Reform Act of 1971.¹⁴⁵ As will be seen, similar issues to those raised and resolved in *Mooney* would arise again in regard to the state Department of Welfare's questionable interpretation of major provisions of the Welfare Reform Act. In fact, the supreme court upheld recently a contempt order issued against the Plumas County Board of Supervisors after they had refused to follow the mandate of state and federal laws regarding the payment of welfare benefits.¹⁴⁶ The Board had alleged that the laws' provisions, if followed, would impose an undue strain on the county's budget. This controversy is ongoing. Resolution by the courts is difficult in light of the economic reality of insufficient funds to provide subsistence level income to all of the state's indigent and the political tend-

chronic myoclonic epilepsy and had been receiving aid to the totally disabled (ATD). He required fifteen hours of personal nursing care per day, but the Director of Health Care Services had refused to pay for such exceptional care on the grounds that it did not come within any of the classifications of medical treatments specified in existing Medi-Cal regulations. The Director did not argue that such individualized treatment was infeasible but merely that it was not specifically authorized. Although the court agreed that the unique disease did not fit precisely within "any of the pigeon holes of the Medi-Cal regulations," it nonetheless refused to consign the petitioner to death. *Id.* at 10, 489 P.2d at 1385, 98 Cal. Rptr. at 57. Instead it found general authority in the governing statutes and regulations to permit the payment of these exceptional services and therefore mandated the Director of Health Care Services to make such payments. It further indicated that because new regulations were being considered, the Director should make some attempt to deal with this problem in the new regulations.

145. The avowed goal of the Reagan administration was to protect the "truly needy," those recipients without any outside resources, and to refuse to subsidize the "legal cheaters" "whose greed is greater than their need," *i.e.*, those AFDC families with some outside income or resources. *Welfare Out of Control*, U.S. NEWS & WORLD REPORT, Feb. 8, 1971, at 30. See CAL. DEPT OF SOCIAL WELFARE, WELFARE REFORM IN CALIFORNIA 8, 10 (1972) [hereinafter cited as WELFARE REFORM IN CALIFORNIA].

146. *Ross v. Superior Ct.*, 19 Cal. 3d 889, 569 P.2d 727, 141 Cal. Rptr. 133 (1977) (Tobriner, J., writing for a majority of four). Plumas County supervisors were found in contempt of court for failing to make retroactively-mandated payments to pregnant recipients and AFDC children sharing housing with recipients of aid to the aged, blind, or disabled in a consolidated action brought by the successful litigants in *California Welfare Rights Organization v. Brain*, 11 Cal. 3d 237, 520 P.2d 970, 113 Cal. Rptr. 154 (1974) and *Cooper v. Swoap*, 11 Cal. 3d 856, 524 P.2d 97, 115 Cal. Rptr. 1 (1974). Continued refusal of the county to make back welfare payments recently prompted a Sacramento superior court judge to give the state authority to start receivership proceedings against the county. See 102 THE RECORDER 19, Jan. 27, 1977, at 1, col. 6-7.

ency to allocate the insufficient funds among prospective recipients according to their "worthiness."

California's Welfare Reform Act of 1971

In the *Mooney* opinion Justice Tobriner adverted to the mammoth legislative undertaking then in progress to overhaul California's welfare laws¹⁴⁷ an undertaking precipitated by an unprecedented growth in the state's welfare rolls¹⁴⁸ which had been characterized by Governor Reagan as "a cancer eating at our vitals."¹⁴⁹ Welfare reform was the recognized central plank of Governor Reagan's bid for the presidential nomination¹⁵⁰ and the "Number One Priority" of his second term.¹⁵¹ His concept of reform, however, was almost diametrically opposed to that of the predominantly Democratic legislature.¹⁵² Legislative leaders attributed the welfare crisis primarily to the national recession and therefore favored a federal solution in the form of a national income maintenance program, such as President Nixon was then proposing.¹⁵³ They contemplated that the concomitant streamlining of the state's program would produce a savings that could be used to finance AFDC grant increases and supportive social services designed to reduce welfare dependence.¹⁵⁴ Governor Reagan, on the other hand, blamed intervention from Washington for the "runaway welfare crisis" and vehemently opposed a federalized system of guaranteed income.¹⁵⁵ His strategy of reform involved increased state control. It included "purification" of the present system by curbing welfare fraud and by reducing aid to "legal cheaters"¹⁵⁶ and increasing aid to the "truly needy," AFDC families with no outside income.¹⁵⁷

147. 4 Cal. 3d at 680, 483 P.2d at 1238, 94 Cal. Rptr. at 286.

148. See WELFARE REFORM IN CALIFORNIA, note 145 *supra*, at 8.

149. *Welfare Out of Control*, U.S. NEWS & WORLD REPORT, Feb. 8, 1971, at 30 (quoting Governor Reagan in his 1971 message to the state legislature).

150. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN 374-75 (1973).

151. See WELFARE REFORM IN CALIFORNIA, *supra* note 145, at 8.

152. See Beilenson & Agran, *The Welfare Reform Act of 1971*, 3 PAC. L.J. 475 (1972) [hereinafter cited as *The Welfare Reform Act of 1971*].

153. *Id.* at 478.

154. *Id.* at 479.

155. Testimony of Governor Reagan before the Senate Finance Committee (Feb. 1, 1972) (reprinted in WELFARE REFORM IN CALIFORNIA, *supra* note 145, at 151).

156. AFDC families with significant outside income were considered "legal cheaters." This group constituted approximately one-third of all AFDC families in California at the time. *The Welfare Reform Act of 1971*, *supra* note 152, at 481 n.27.

157. See Address by Governor Reagan, Town Hall (Mar. 3, 1971) (cited in *The Welfare Reform Act of 1971*, *supra* note 152, at 477 n.8).

Extensive and often bitter negotiations¹⁵⁸ produced the Welfare Reform Act of 1971. The Act was hailed by the Reagan administration as a major political victory for the Governor and as "the cutting edge of welfare reform in this country."¹⁵⁹ On the other hand, it was characterized by Senator Beilenson, the Chairman of the California Senate Health and Welfare Committee, as "'schizophrenic legislation' — providing important new benefits to the poor in some areas while at the same time imposing new, and often harsh, restrictions in other areas."¹⁶⁰ He perceived it not as "total welfare reform" but as merely an interim step until the establishment of a national income maintenance program.¹⁶¹

The principal achievement of the new act was the substitution of a uniform flat grant system for the prior legislative scheme, which had delegated to the Department of Social Welfare the authority to determine recipients' needs on an individualized basis, up to a statutory maximum.¹⁶² At the same time the statute withdrew the department's authority independently to establish an objective minimum standard of need against which to measure the grant payment¹⁶³ and substituted a statutory standard of need.¹⁶⁴

The flat grant system was designed to effect a substantial administrative savings by eliminating the necessity of individualized need determinations.¹⁶⁵ It was also designed "as a leveling mechanism to increase benefits to recipients with no outside income and to decrease benefits to recipients with significant outside income."¹⁶⁶ Under the

158. *The Welfare Reform Act of 1971*, *supra* note 152, at 479; WELFARE REFORM IN CALIFORNIA, *supra* note 145, at 16.

159. See WELFARE REFORM IN CALIFORNIA, *supra* note 145, at 16. Under the prior law, the department determined grant payments to a particular eligible family by reference to detailed allowance schedules for particular need items such as food and clothing based on factors such as family size, age of children, county of residence, and the like, and by payment of other need items such as housing and utilities in accordance with actual expenses up to a specified administrative maximum. *Cooper v. Swoap*, 11 Cal. 3d 856, 861-63, 524 P.2d 97, 99-101, 115 Cal. Rptr. 1, 3-5 (1974). The total grant could not exceed the statutory maximum.

160. *The Welfare Reform Act of 1971*, *supra* note 152, at 475-76.

161. *Id.* at 502.

162. FORMER CAL. WELF. & INST. CODE § 11450(a) (West 1954) (repealed and superseded effective 1971).

163. FORMER CAL. WELF. & INST. CODE § 11452 (West 1966).

164. CAL. WELF. & INST. CODE § 11452 (West 1972).

165. See *Cooper v. Swoap*, 11 Cal. 3d 856, 861-62, 524 P.2d 97, 100, 115 Cal. Rptr. 1, 4 (1974); WELFARE REFORM IN CALIFORNIA, *supra* note 145, at 14. The United States Supreme Court had recently approved such a simplified system based on "a fair averaging" of welfare grants. *Rosado v. Wyman*, 397 U.S. 397 (1970).

166. *The Welfare Reform Act of 1971*, *supra* note 152, at 480.

previous system, because the maximum per-family grant always fell short of the standard of need, families with some outside income were permitted to retain that income to bridge the gap between their objective need and their grant payment without suffering any reduction in benefits.¹⁶⁷ The leveling mechanism instituted by the Welfare Reform Act eliminated this differential between AFDC families without any source of outside income and families with some outside income. This effect was accomplished by the subtraction of non-exempt income directly from the statutory flat grant rather than from the higher statutory standard of need.¹⁶⁸

The reaction of welfare rights groups to the flat grant approach was ambivalent. Although they were understandably concerned about the reduction of benefits to families hitherto receiving higher grants than the new average, they could not object to the increase in benefits which resulted to other families. Nor could they object to the projected savings in administrative costs that the legislature intended to funnel back into the benefit program. Moreover, the flat grant approach embodied "the money payment principle,"¹⁶⁹ by which recipients received their grant money and autonomously determined how it was to be allocated to their needs. By contrast, under the prior paternalistic system the department had determined the budgetary needs of individual recipients on an item-by-item basis.¹⁷⁰

While the Welfare Reform Act was still in the process of negotiation, organizations such as San Francisco Neighborhood Legal Assistance Foundation (SFNLAF) voiced their vehement opposition to numerous supplementary provisions of the proposed flat grant system, such as the dollar-for-dollar reduction of grants for the receipt of income. This provision appeared to contravene a controlling provision of the federal legislation.¹⁷¹ There were, in addition, other more blatantly illegal provisions, such as a one-year residency requirement¹⁷² for welfare eligibility in counties with high unemployment

167. See *id.* at 481.

168. CAL. WELF. & INST. CODE § 11450(a) (West 1954). See *The Welfare Reform Act of 1971*, *supra* note 152, at 480.

169. *Cooper v. Swoap*, 11 Cal. 3d 856, 862 n.6, 524 P.2d 97, 100, 115 Cal. Rptr. 1, 4 (1974).

170. *Id.*

171. 42 U.S.C. § 602(a)(7) (1970).

172. CAL. WELF. & INST. CODE § 11252.5 (West 1954). This provision applied only to needy parents of children in the AFDC program. No comparable provision was enacted with respect to the old age assistance, and to the totally disabled, or aid to the blind programs. The provision was immediately challenged in a class action and summary judgment was granted in favor of plaintiffs on February 15, 1972. *Brown*

rates. The latter provision directly conflicted with the mandate of *Shapiro v. Thompson*.¹⁷³

In fact, Governor Reagan and the legislative leadership were fully cognizant of the vulnerability of such provisions to constitutional attack.¹⁷⁴ The Governor's strategy soon became evident: to pressure the courts to assume a deferential approach, thereby approving all of the new legislation and administrative regulations.¹⁷⁵ When this strategy proved unsuccessful, he blamed the courts for "bungling interference" with welfare reform.¹⁷⁶

Prior to the Reform Act, administrative conduct in contravention of federal mandates¹⁷⁷ had already led welfare rights organizations to declare outright war¹⁷⁸ against the Reagan administration. After observing the form the new compromise legislation was taking, leaders of these organizations warned that, as soon as it was enacted, they would take their challenges to the courts.

v. Carleson, No. 217636 (Sacramento County, Cal. Super. Ct., Feb. 15, 1972) (no appeal taken).

173. 394 U.S. 618 (1969). In fact, *Shapiro* involved fewer equal protection issues than did *Brown v. Carleson*, No. 217636 (Sacramento County, Cal. Super. Ct., Feb. 15, 1972) (no appeal taken), because the one-year residency requirement in *Brown* only applied to AFDC parents and also only applied in counties with six percent or more unemployment.

174. In a newspaper article published contemporaneously with the enactment of the Welfare Reform Act, State Senator Anthony Beilenson wrote: "Our strategy was to give the Governor a watered-down unconstitutional residency requirement in exchange for real program benefits Passing the buck to the courts is, of course, not the preferred way to legislate. But in terms of the ultimate effects on poor people, the trade-off in this instance seems reasonable." ACLU, S. Cal. Open Forum, Oct. 1971, at 3, col. 4.

175. See generally L.A. Times, Oct. 2, 1971, § 1, at 1, col. 5: "Using some of the harshest language he has ever used publicly against the judiciary, Reagan charged [that] the courts made 'hasty and uninformed decisions' The Governor's statement . . . was followed shortly by a news conference with James M. Hall, Secretary of Human Relations . . . [who] delivered an even stronger attack on the Supreme Court, declaring it had been 'used' by the antipoverty lawyers"

176. *Id.*

177. See, e.g., *County of Alameda v. Carleson*, 5 Cal. 3d 730, 488 P.2d 953, 97 Cal. Rptr. 385 (1971); *California Welfare Rights Organization v. Carleson*, 4 Cal. 3d 445, 482 P.2d 670, 93 Cal. Rptr. 758 (1971). See WELFARE LAW, *supra* note 10, at 579. The commentator suggests that the cases therein discussed not only reflect "a pattern of law violation on the part of the welfare bureaucracy of this state, but [also] . . . a pattern of intentional avoidance of court judgments." *Id.* at 580.

178. See reprint of handout to welfare recipients prepared by welfare rights organizations, WELFARE REFORM IN CALIFORNIA, *supra* note 145, at 20:

"Our Goal 100,000 Fair Hearing Requests and Grant Hearing Requests
\$100 million in Back Money for California Rights Organization
Membership

Reinterpretation of Controlling Federal Legislation

The first case under the new act, *Villa v. Hall*,¹⁷⁹ reached the California Supreme Court by writ of mandate less than three weeks after the law was enacted¹⁸⁰ and just one day after the court issued its landmark decision in the public school financing challenge of *Serrano v. Priest*,¹⁸¹ holding that wealth was a suspect classification that required "close scrutiny" was required regardless of whether discrimination based on it was de facto or de jure.¹⁸² In *Villa*, the petitioning class of recipients challenged, as violative of the governing provisions of the Social Security Act, the previously mentioned requirement of the Welfare Reform Act for a dollar-for-dollar reduction of a recipient's grant on the basis of nonexempt income. Relying on the United States Supreme Court's interpretation of the controlling federal provisions in *Rosado v. Wyman*,¹⁸³ Justice Mosk, writing for

100,000 new members for our local groups
Screw up the County and State Welfare Departments
STOP REAGAN FROM BECOMING PRESIDENT OF THE
UNITED STATES

And anything else you might want to do — THIS IS WAR"

179. 6 Cal. 3d 227, 490 P.2d 1148, 98 Cal. Rptr. 460 (1971) *vacated and remanded in light of* *Jefferson v. Hackney*, 406 U.S. 535 (1972), 406 U.S. 965. On remand, the California Supreme Court discharged the alternative writ, denied the preemptory writ, and vacated the order staying operation of § 28 of the Welfare Reform Act. 7 Cal. 3d 926, 500 P.2d 887, 103 Cal. Rptr. 863 (1972).

180. The Act was signed by the Governor on August 13, 1971, to become effective October 1, 1971. The writ of mandate was filed with the court on August 31, 1971. In granting the writ, the court also granted a stay order preventing implementation of the challenged provisions, pending determination of their validity by the court.

181. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

182. *Id.* at 601-04, 487 P.2d at 1252-55, 96 Cal. Rptr. at 612-15.

183. 397 U.S. 397 (1970). In *Rosado*, Justice Harlan, writing for the majority, required New York State to comply with a congressional amendment to the Social Security Act that required all participating states to make cost of living adjustments in their welfare benefit programs. A question was raised as to whether the courts were the proper body to determine compliance. The *Rosado* court expressly rejected the argument which had previously been implicitly rejected in *King v. Smith*, 392 U.S. 309 (1968), that the Department of Health, Education and Welfare had exclusive primary jurisdiction to determine a state program's compliance with federal law because Congress had empowered HEW to cut off federal funds from a noncomplying state. Chief Justice Burger shared Justice Black's view that HEW had been given primary jurisdiction to determine a state's compliance with the federal welfare scheme. *Id.* at 430 (Black, J., dissenting).

Reliance upon HEW denial of funds as the sole permissible sanction would have effectively prohibited welfare recipients from obtaining any relief from a recalcitrant state. This point was to be graphically demonstrated by the difficulty involved in implementing the same federal cost of living provision in California. See *California Welfare Rights Organization v. Carleson*, 4 Cal. 3d 445, 448-50, 482 P.2d 670, 672-74,

a unanimous court, held that the challenged portion of the new legislation violated both the letter and the spirit of the Social Security Act, which required income to be taken into consideration *in determining need* of a recipient.¹⁸⁴ As required by federal law, income could be subtracted only from the statutory need figure and not from the lesser maximum-grant figure. This latter figure related solely to California's budgetary constraints, which disabled it from providing 100 percent of recipients' needs.

As the *Villa* court was well aware, the validity of a similar Texas provision was simultaneously being considered by the new conservative majority on the United States Supreme Court in the case of *Jefferson v. Hackney*.¹⁸⁵ Instead of a statutory maximum grant, like that in California, Texas was one of twenty-six states using the alternative budgetary device of a percentage reduction system.¹⁸⁶ Jus-

93 Cal. Rptr. 758, 760-62 (1971). The application of the cost of living increases to California's maximum grants was clear from the outset. The interplay was to take effect July, 1969. Nevertheless, the State of California delayed implementing these increases until June, 1971. Meanwhile, both federal and state courts had declared that the state was not in compliance with federal law. *Bryant v. Montgomery*, No. 51909-AJZ (N.D. Cal. filed August 6, 1969) *rev'd on other grounds sub nom.* *Bryant v. Carleson*, 444 F.2d 353 (9th Cir. 1971); *California Welfare Rights Organization v. Carleson*, 4 Cal. 3d 445, 482 P.2d 670, 93 Cal. Rptr. 758 (1971). HEW, prodded by private suits to compel it to take action, had reached a similar conclusion and had twice notified the state of its decision to terminate federal funds if compliance was not forthcoming. The first such notification by HEW had been issued and withdrawn within twenty-four hours after a quick series of telephone calls between Governor Reagan, Vice President Agnew, and HEW Secretary Elliot Richardson, in which Richardson was persuaded to rescind the HEW decision, pending final resolution of *California Welfare Rights Organization v. Carleson*, 4 Cal. 3d 445, 482 P.2d 670, 93 Cal. Rptr. 758 (1971). See P. SITKIN, *WELFARE LAW: NARROWING THE GAP BETWEEN CONGRESSIONAL POLICY AND LOCAL PRACTICE, STUDIES IN PUBLIC WELFARE, SUBCOMMITTEE ON FISCAL POLICY OF THE JOINT ECONOMIC COMMITTEE* 36, 40-45 (March 12, 1973).

184. 6 Cal. 3d 227, 235, 490 P.2d 1148, 1153, 98 Cal. Rptr. 460, 465 (1971).

185. 406 U.S. 535 (1972). In its argument to the court, the State Department of Social Welfare relied heavily on HEW's approval of the Texas plan, as demonstrated in HEW's amicus brief to the United States Supreme Court in *Jefferson*. See 6 Cal. 3d at 232, 490 P.2d at 1151, 98 Cal. Rptr. at 463.

186. The maximum grant and the percentage reduction systems are two methods by which states allocate limited welfare funds among eligible recipients. Under both systems, the state first calculates the monetary needs of persons eligible for categorical assistance and then compares the total need figure with the amount budgeted by the state for each of its categorical aid programs. In states that use the maximum grant system a specified maximum is then imposed on any single grant payment in order to stay within the budget. In states that use the percentage reduction system, a percentage reduction factor is applied to all recipients of a particular categorical aid program so that each recipient or recipient group has the same percentage of its need met by the assistance payment.

tice Rehnquist wrote for a bare majority in upholding the Texas method of subtracting a recipient's nonexempt income from the ratably reduced grant payment, rather than requiring Texas to subtract the income from the standard of need and then apply its percentage reduction factor.¹⁸⁷ *Certiorari* was subsequently granted in *Villa*,¹⁸⁸ and the case was vacated and remanded for reconsideration in light of *Jefferson*. Compelled by the contrary interpretation of the controlling federal legislation by the United States Supreme Court, the California Supreme Court reversed its decision.¹⁸⁹

Relative Responsibility Laws Under the Act

In *Swoap v. Superior Court*,¹⁹⁰ an opinion authored by Justice Sullivan, the court upheld recently revised relative responsibility provisions, the predecessors of which had been unanimously struck down by the court less than two years earlier in *County of San Mateo v. Boss*.¹⁹¹ In so doing, the court also all but overruled its previous "landmark" decision in *Department of Mental Hygiene v. Kirchner*.¹⁹²

187. In *Jefferson*, the Court also upheld against an equal protection challenge the decision of the Texas legislature to limit spending on the AFDC program to seventy-five percent of determined need while providing one-hundred percent funding for its other categorical aid programs. 406 U.S. 535, 545-51 (1972).

188. 406 U.S. 965 (1972).

189. 7 Cal. 3d 926, 500 P.2d 887, 103 Cal. Rptr. 863 (1972).

190. 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973).

191. 3 Cal. 3d 962, 479 P.2d 654, 92 Cal. Rptr. 294 (1971).

192. 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964), *cert. granted*, 379 U.S. 811 (1964), *vacated and remanded*, 380 U.S. 194 (1965), *reiterated solely on state grounds*, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965). *Kirchner* had received narrow construction in court of appeals decisions. Thus, in *In re Dudley* (in which the County of Alameda successfully sought partial reimbursement from a woman for the care of her mentally deficient adult daughter) the court analyzed the issue as follows: "If *Kirchner* stands for the proposition that when the state, in the exercise of its promotion of the general welfare, commits a person either for the protection of society or for his protection or rehabilitation, or any combination thereof, it cannot thereafter seek reimbursement except from such person or his estate, that case is determinative of the matter in issue. On the other hand, if *Kirchner* is limited to its facts and does not preclude the state from seeking reimbursement from those otherwise legally responsible for the care, support and maintenance of the person treated, inquiry must be directed to a determination of whether or not respondent is responsible for the support of her adult daughter; and, if so, whether the state has properly provided for the enforcement of any obligation arising from that responsibility." 239 Cal. App. 2d at 407, 48 Cal. Rptr. at 794 (citation omitted), quoted with approval by the *Swoap* majority, 10 Cal. 3d at 496-97, 516 P.2d at 844-45, 111 Cal. Rptr. at 140-41. The *Dudley* court concluded that *Kirchner* "does not expressly . . . restrict the right to recoupment to the inmate, or his estate, but states that the cost may not arbitrarily be charged to one class of persons. Such an arbitrary charge

In *Boss*, the court had reaffirmed the broad principles established in *Kirchner* by holding that the adult child of a recipient of aid under the Old Age Security Law (OAS) could not constitutionally be compelled to make reimbursement to the state under Welfare and Institutions Code sections 12100 and 12101 if he was under a pre-existing obligation to support his parent by common law duty or statute.¹⁹³ The precise holding in *Boss* rested on the conclusion that, although Civil Code section 206 created a support obligation upon children of "poor" parents, the defendant's mother's eligibility for OAS benefits was predicated on a more encompassing "need" standard. Because she owned a home valued at \$31,800, she was not so "poor" as to obligate her son for her support under Civil Code section 206, although ownership of this property did not prevent her from qualifying as needy for purposes of the OAS laws.¹⁹⁴

In observing that the mother had assets, however, the *Boss* court expressly rejected the argument suggested by language in *Kirchner* that the unconstitutionality of the challenged provisions resulted from the failure of those provisions "to vest . . . [in] the servient relatives any right of control over, or to recoup from, the assets of the patient."¹⁹⁵ The *Boss* court concluded that "the classification of responsible relatives [in *Kirchner*] lacked a rational basis. . . . [T]he absence of recoupment provisions in this case is irrelevant to the basic task of determining whether the classification of adult children is a rational one."¹⁹⁶ While thus clarifying the reach of *Kirchner*, the court nevertheless emphasized the *Kirchner* court's recognition that "the costs of such care could, consistently with equal protection, be charged to those persons who had a preexisting duty to support the recipient of the care."¹⁹⁷ Because the particular defendant in *Boss* was determined not to have such a preexisting duty under Civil Code section 206, the

results when liability is imposed on a daughter because of blood relationship alone without regard for the means of the parent patient . . . [or on] a relative who except for the arbitrary statute was in no other manner liable for the support of the patient." 239 Cal. App. 2d at 411-12, 48 Cal. Rptr. at 797, quoted by the *Swoap* majority, 10 Cal. 3d at 497, 516 P.2d at 844, 111 Cal. Rptr. at 140.

193. 3 Cal. 3d at 967-68, 479 P.2d at 656-57, 92 Cal. Rptr. at 297-98 (1971).

194. *Id.* at 971, 479 P.2d at 659-60, 92 Cal. Rptr. at 299-300.

195. *Id.* at 972, 479 P.2d at 660, 92 Cal. Rptr. at 300, quoting Department of Mental Hygiene v. *Kirchner*, 60 Cal. 2d at 722, 388 P.2d at 724, 36 Cal. Rptr. at 492, cert. granted, 379 U.S. 811 (1964), vacated and remanded, 380 U.S. 194 (1965), reiterated solely on state grounds, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

196. 3 Cal. 3d at 972, 479 P.2d at 660, 92 Cal. Rptr. at 300.

197. *Id.* at 967, 479 P.2d at 657, 92 Cal. Rptr. at 297.

court expressly reserved the question of the constitutionality of the duty of support for the "poor" created by Civil Code section 206, intimating in a footnote that it might well be susceptible to an equal protection challenge.¹⁹⁸

The relative responsibility laws involved in *Boss* required only small contributions from adult children, a compromise position between an outright ban upon relative responsibility, as had already been achieved in the programs for the blind and disabled, and more onerous relative responsibility provisions, such as were contained in the state AFDC program. As part of the Welfare Reform Act, the Legislature, "[a]t the insistence of the [Reagan] Administration,"¹⁹⁹ had given the department authority to increase drastically the required schedule of payments from adult children of OAS recipients.²⁰⁰ In apparent response to the court's decision in *Boss*, Civil Code section 206 was also amended to require adult children to support parents "in need" and to provide that a "person who is receiving aid to the aged shall be deemed to be a person in need."²⁰¹

Thus, in *Swoap*, the court was squarely faced with the previously postponed constitutional question: was the legislature constitutionally empowered to pass laws creating peculiar liability of relatives of the needy. Given the long history of relative responsibility provisions and the political questions that they raised and further given the absence of support from the United States Supreme Court for the broad constitutional principle enunciated in *Kirchner*, the California Supreme Court not surprisingly accepted the legislature's power to determine this issue and retreated to the position of limiting its prior decisions in *Kirchner* and *Boss* to their facts.²⁰²

198. *Id.* at 971 n.8, 479 P.2d at 660, 92 Cal. Rptr. at 300.

199. *The Welfare Reform Act of 1971*, *supra* note 152 at 489.

200. The complete delegation of authority to the department was an apparent attempt by the legislature to disassociate itself from any responsibility for the law that it had passed. See *The Welfare Reform Act of 1971*, *supra* note 152, at 489.

201. 1971 Cal. Stats., ch. 578, § 3 at 1137 (codified at CAL. CIV. CODE § 206 (West Supp. 1977)).

202. 10 Cal. 3d at 502, 516 P.2d at 848, 111 Cal. Rptr. at 144. The decision holding the provision constitutional was based on the historical duty of children to support their poor parents, which dated back to the Elizabethan Poor Law of 1601. The majority concluded that "[t]his duty existed prior to, and independent of, any duties arising out of the state assistance to the aged." *Id.* at 504, 516 P.2d at 849, 111 Cal. Rptr. at 145. In an accompanying footnote, the court specifically overruled *Boss* to the extent that "it is inconsistent with our views and holding herein" and held that the liability was constitutionally imposed on all children regardless of whether they would be liable for the support of their aged parents under Cal. Civ. Code § 206 (West Supp. 1977). *Id.* at 502 n.10, 516 P.2d at 848, 111 Cal. Rptr. at 144.

Justice Tobriner, joined by Justice Mosk, wrote a blistering dissent, which was perhaps his most eloquent and articulate statement on the obligation of the state with regard to public assistance programs and the manner in which they are to be financed. Unhampered by the constraints of a majority opinion, he presented his own analysis of the constitutional issues involved and attacked the statutes in question as denying equal protection of the law. He concluded that a denial of equal protection resulted from the imposition of the cost of public old age assistance on adult children of the poor when the adult children would not have been legally responsible for providing such services if the state had not undertaken its public program. He described the majority opinion not only as overruling *Boss* and being irreconcilable with *Kirchner* but also as "a dangerous inroad into basic principles of individual freedom and minority rights" ²⁰³ Justice Tobriner further stated that the majority opinion "greatly expands the power of the state to foist general expenses on the shoulders of small classes of citizens, permitting the majority, by a unilateral decision to provide certain benefits to some of its citizens, to require a designated minority to bear expenses for which they would otherwise not be responsible. . . . [A]cceptance of the majority's new constitutional analysis would open the door to a wide abuse of majoritarian power." ²⁰⁴

In his dissent, Justice Tobriner demonstrated the inconsistency of *Swoap* with the dictates of *Kirchner*. Under the prior decisional law in California, the state could seek reimbursement from a relative of a benefited person only when the relative would have been legally responsible for support even if the state had not undertaken its public program. ²⁰⁵ Although the court had not adjudicated the constitutionality of Civil Code section 206 in *Boss*, it had held that, at least where no duty existed under that section, the state could not enforce a reimbursement obligation against an adult child of a recipient of aid to the aged. ²⁰⁶ Justice Tobriner observed that the *Swoap* court could have held, consistent with *Boss*, that the state could seek reimburse-

203. *Id.* at 511, 516 P.2d at 855, 111 Cal. Rptr. at 151.

204. *Id.* at 512, 516 P.2d at 855, 111 Cal. Rptr. at 151.

205. *Id.* at 511, 516 P.2d at 855, 111 Cal. Rptr. at 151.

206. *Id.* at 516-17, 516 P.2d at 858-59, 111 Cal. Rptr. at 154-55. In this regard, Tobriner noted that there was considerable case law interpreting the scope of former § 206's duty of support on the basis of factors such as (1) what demands were made by the adult child's children (which take precedence over the parent's needs), (2) what was the total wealth of all of the parent's children, and (3) whether the parent by ill treatment of the child had lost his right to demand full support from his child. *Id.* at 517 n.3, 516 P.2d at 859, 111 Cal. Rptr. at 155.

ment under Welfare and Institutions Code sections 12100 and 12101 from adult children of OAS recipients but only to the extent that they were legally liable for the support of their parents under Civil Code section 206.²⁰⁷

Nevertheless, Justice Tobriner would have gone further. In his view, Civil Code section 206 was itself unconstitutional.²⁰⁸ As the majority had pointed out, even under the Elizabethan Poor Law, the legal liability of relatives was designed to indemnify the public and minimize its costs in relieving the poor.²⁰⁹ Although the majority considered this historical record sufficient justification for continuing to impose the duty, seminal decisions, such as *Brown v. Board of Education*,²¹⁰ had demonstrated the inadequacy of judicial inquiry limited to tradition: "tradition is not evidence of rationality but only of practice."²¹¹ To Justice Tobriner, the historical background demonstrated that the statutory duty of support created by section 206 had never been "independent" of the state's reimbursement provisions but, on the contrary, was established merely to implement such reimbursement and to reduce the state's responsibilities. "Given the history and purpose of Section 206, it cannot be said that adult children would have been legally obligated to support their needy parents *absent the state's decision to provide such aid*."²¹²

Justice Tobriner concluded that singling out adult children of parents who are poor to bear the burden of old age assistance payments constituted a denial of equal protection. Relying on Professor ten-Broek's analysis of the "doubly invidious" history of the family law of the poor,²¹³ Justice Tobriner took the further step of equating poverty as a classifying trait with race, creed, and other suspect classifications. In his view the decision of the court in *Serrano v. Priest*²¹⁴ was controlling on this issue.

207. *Id.* at 520, 516 P.2d at 861, 111 Cal. Rptr. at 157.

208. *Id.* at 521-22, 516 P.2d at 861-62, 111 Cal. Rptr. at 157-58.

209. *Id.* at 503, 516 P.2d at 849, 111 Cal. Rptr. at 145. See note 202 *supra*.

210. 347 U.S. 483, 492-93 (1954).

211. *California's Dual System of Family Law*, *supra*, note 12, at 643.

212. 10 Cal. 3d at 521-22, 516 P.2d at 862, 111 Cal. Rptr. at 158 (emphasis in original). For criticism of Justice Tobriner's review of the history of CAL. CIV. CODE § 206 (West Supp. 1977), see *The Supreme Court of California 1973-1974*, 63 CALIF. L. REV. 11, 99 (1975).

213. *California's Dual System of Family Law*, *supra* note 12, at 644.

214. 5 Cal. 3d 584, 597, 487 P.2d 1241, 1250, 196 Cal. Rptr. 601, 610 (1971). The declaration of the California Supreme Court in *Serrano* that wealth was a suspect classification preceded the United States Supreme Court's decision in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), in which the high court

In his *Swoap* dissent, Justice Tobriner made explicit the views that were implicit in some of his previous opinions. "The frequently fortuitous circumstance"²¹⁵ of poverty was a burden that the state had undertaken to alleviate. The arbitrary selection of a private group to bear a disproportionate share of the public expense was an abuse of majoritarian power and a denial of equal protection of the law.²¹⁶ Observing that it is always popular to reduce the general tax burden, Justice Tobriner asserted that the potential for abuse of majoritarian power was "particularly hazardous" in the context of relative responsibility laws because "the group singled out to bear a disproportionate share of the public expenses will frequently be a small minority, often with no cohesive characteristics that would permit effective political representation."²¹⁷

Ironically, although Justice Tobriner's dissent was premised on his assessment of the "social reality"²¹⁸ of the dual system of family law in California, the majority opinion could also be read as a reflection of a kind of "social reality:" that of the political consensus evidenced by the recent legislative determination to expand the existing reimbursement requirement of relatives of the poor. In addition, the high priority placed by the Governor on enacting these new provisions, which had been specifically worded to circumvent the *Boss* ruling, turned *Swoap* into a direct political challenge from the Governor to the court. Although a judicial refusal to legitimate this legislation, either in whole or in part, could have rested on constitutional principles previously enunciated in *Kirchner* and reiterated in *Boss*, the Reagan administration would certainly have viewed such a ruling as an act of political war.²¹⁹ Whether the majority was influenced by such possible political repercussions, it was in any event unprepared to make a sweeping ruling that the constitution absolutely prohibits the state from seeking reimbursement for the provision of public assistance from relatives of indigent recipients. Instead it recognized the power

refused to hold that wealth was a suspect classification in a challenge to Texas' system for public school finance which combined local property taxes and state funds. When *Serrano* was again before the California Supreme Court, the court reaffirmed on state grounds alone its holding that wealth was a suspect classification and education a fundamental interest. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

215. 10 Cal. 3d at 523, 516 P.2d at 863, 111 Cal. Rptr. at 159.

216. *Id.* at 518, 525, 516 P.2d at 859, 865, 111 Cal. Rptr. at 155, 161.

217. *Id.* at 518, 516 P.2d at 859, 111 Cal. Rptr. at 155.

218. Justice Tobriner considers that one role of the judiciary is to accomplish the "sensitive accommodation of constitutional principles to social reality." *Id.* at 525, 516 P.2d at 864, 111 Cal. Rptr. at 160.

219. See note 175 & accompanying text *supra*.

of the legislature to circumvent the constitutional problems posed in *Kirchner* and *Boss*. The unfortunate result was the abandonment of the relative responsibility issue to the political maneuvering in which the executive and legislative branches in Sacramento were then engaged.²²⁰

In Washington, meanwhile, Governor Reagan and others who pressed for the retention of state control of AFDC programs were successful in preventing the federalization of AFDC administration through a national income maintenance program. Congress had, however, passed a law providing supplementary security income for the aged, blind, and disabled,²²¹ thereby shifting these categories of recipients to federally administered programs.²²² The new federal plan made no provision for recoupment from responsible relatives. The plan did contemplate, however, that at least half the states would supplement the program with additional funds. A contributing state would have the option of administering the additional funds itself. Nothing would prevent it from including relative responsibility provisions, such as California's, in its supplementary program. Nevertheless, in 1975 the California legislature finally repealed all relative responsibility provisions relating to the aged, blind, and disabled.²²³

220. In October of 1971, the administration, pursuant to the new legislation had drastically increased the payment schedules then being required of adult children of OAS recipients. See the schedule reprinted in *Swoap v. Superior Court*, 10 Cal. 3d 490, 508, 516 P.2d 840, 852, 111 Cal. Rptr. 136, 148 (1973).

By March of 1973 the schedules had been scaled down somewhat, including a 1972 statutorily mandated fifty percent allowance for taxes and expenses of a responsible relative who reached age sixty. CAL. WELF. & INST. CODE § 12101 (West 1972). In 1973, the legislature passed the Burton-Moscone-Bagley Citizens' Income Security Act for Aged, Blind and Disabled Californians, which consolidated the three programs in contemplation of pending federal legislation. CAL. WELF. & INST. CODE §§ 12000-12401 (West 1972 & Supp. 1977). As a consequence, the recently upheld OAS relative responsibility provisions were extended to the ATD and AB programs, but the legislature simultaneously reduced the amounts that could be recovered. Former CAL. WELF. & INST. CODE § 12350 enacted in 1973, repealed and superceded in 1975. See note 223 & accompanying text *infra*.

221. 42 U.S.C. §§ 1381-1383C (1974). Governor Reagan had, ironically, favored "the separation of the elderly, blind and disabled categories from the present de-meaning welfare structure and the provision of monthly pension checks for these groups through an automated system similar to social security." WELFARE REFORM IN CALIFORNIA, *supra* note 145, at 14.

222. See Callison, *Early Experience under the Supplemental Security Income Program*, 37 SOC. SEC. BULL. 3, 6 (June 1974).

223. CAL. WELF. & INST. CODE § 12350 (West Supp. 1977). In 1976, the legislature also repealed the recoupment provisions applicable to relatives for payments

Although this result was a moral victory of sorts for Justices Tobriner and Mosk, it nonetheless left standing the relative responsibility provision for county general assistance²²⁴ and the MARS contribution provision contained in the AFDC program.²²⁵ Also, because the issue was resolved through the political process rather than as a matter of constitutional principle, relative responsibility provisions may be reestablished at any time if a majority of the legislature again finds it politically popular to do so.

This potential reversion is the crux of the problem as seen by Justice Tobriner. To leave the fate of powerless minorities to the winds of partisan politics is an abdication of the judiciary's responsibility to protect individual rights. Although the Reagan administration ultimately failed in its efforts to shift the state's burden to relatives of public assistance recipients, it did so only after attempting to drag the court into the fray and to force the court to retreat from the principles of equal protection that had been suggested in *Kirchner* and *Boss*.

Subsequent Challenges to the Act and Its Implementation

The problems generated by the Welfare Reform Act were far from over. Several important cases were in the appellate stage when *Swoap* issued. The four major cases in this area decided by the court in 1974 differed in their thrust from those previously decided; only one challenged specific provisions of the Act, three others challenged the implementation of the Act by the Department of Social Welfare.²²⁶ Three of the four decisions were written by Justice Tobriner. Two involved a bare majority of the court, and although the issues this time centered on statutory rather than constitutional interpretation, they marked a personal victory for Justice Tobriner in light of his scathing dissent in *Swoap* barely six months earlier.

Conover v. Hall

By far the easiest of the three welfare decisions penned by Justice Tobriner, and the only one whose central issue was decided on purely federal grounds, was *Conover v. Hall*,²²⁷ a class action challenging,

made under the prior law. See CAL. WELF. & INST. CODE § 12351 (West Supp. 1977).

224. CAL. WELF. & INST. CODE § 17300 (West 1954).

225. CAL. WELF. & INST. CODE § 11351.5 (West 1954).

226. As of January 1, 1974, the State Department of Social Welfare was renamed the Department of Benefits.

227. 11 Cal. 3d 842, 523 P.2d 682, 114 Cal. Rptr. 642 (1974).

as incompatible with the provisions of the controlling federal statute, the \$50.00 fixed standard deduction for work-related expenses contained in the Welfare Reform Act.²²⁸ Under the Social Security Act, a state must take into consideration "any expenses reasonably attributable to the earning of . . . income"²²⁹ in setting the amount of aid to which a recipient is entitled. Arbitrary limitation of this figure to a standardized amount of \$50.00 was held to conflict with the federal directive. The task of the California Supreme Court was immensely simplified by a ruling two months earlier by the United States Supreme Court in *Shea v. Vialpando*,²³⁰ invalidating a virtually identical Colorado welfare provision on the same grounds. Thus, affirmance of the trial court's invalidation of the statute was unanimous, although Justice Clark, who had taken the place of Justice Peters, wrote a separate concurring opinion.

In addition to the substantive issue decided in *Conover v. Hall*, the Department of Social Welfare raised the arguments that the superior court had no authority to grant a preliminary injunction against the challenged state welfare provision or to waive the requirement of an undertaking.²³¹ These arguments were quickly dismissed,²³² although the latter question of a court's power to dispense with statutory bond requirements had never before been decided by the California Supreme Court. The trial court had granted a preliminary injunction without requiring plaintiffs to post a bond to cover defendants' po-

228. CAL. WELF. & INST. CODE § 11451.6 (West 1954).

229. 42 U.S.C. § 602(a)(7) (1974).

230. 416 U.S. 251 (1974). In *Shea* the United States Supreme Court read the Social Security Act requirement of the consideration of "any" reasonable work expenses as a congressional directive that no limitation apart from reasonableness, could be placed upon the recognition of expenses attributable to the earning of income. The Court explained that standardized treatment of employment related expenses results in a disincentive to seek or retain employment for all recipients whose reasonable work expenses exceed or would exceed the standard. Any state procedure creating such a disincentive would be in direct conflict with the congressional goal of encouraging employment. *Id.* at 264.

231. 11 Cal. 3d 842, 846, 849-50, 523 P.2d 682, 684, 686-87, 114 Cal. Rptr. 642, 644, 646-47 (1974).

232. Justice Tobriner cited earlier supreme court decisions holding that the statute prohibiting injunctions against the enforcement of public statutes, CAL. CIV. PROC. CODE § 526 (West 1972), did not apply to injunctions sought to bar the enforcement of unconstitutional statutes. The court could see no distinction between enjoining statutes that were unconstitutional and enjoining the instant statute, which was invalid owing to a failure to comport with controlling federal law. The court also rejected the department's argument that the preliminary injunction was improperly issued because there had been no explicit finding of irreparable injury. 11 Cal. 3d at 850, 523 P.2d at 687, 114 Cal. Rptr. at 647.

tential damages. This requirement would, as a practical matter, have prohibited a preliminary injunction from being issued, because the statute in question had been projected to save the state approximately \$12 million annually.²³³ Justice Tobriner stated that just as California courts retain common law authority to dispense with court fees despite the apparent mandatory character of statutes calling for the payment of such fees, they also retain a common law power to dispense with "cost bonds" and "damage bonds."²³⁴

The ruling that the trial court had equitable power to dispense with the bond requirement seems compelled if welfare recipients are to have full access to the judicial forum. To hold otherwise would mean that, although welfare recipients might convince the trial court that a newly enacted state welfare provision reducing benefits was unconstitutional, the very magnitude of the resulting deprivation to welfare recipients would prevent them from obtaining a preliminary injunction.

In the context of a program that provides beneficiaries with their very livelihood, the ability to challenge substantive provisions before they go into effect is of tremendous significance. Even with the availability of retroactive benefits, the preliminary injunction offers far greater protection to persons at the subsistence level. Therefore, even though the resolution of the central issue in *Conover* had been predetermined by the United States Supreme Court, Justice Tobriner was able to extend the availability of an important procedural device to welfare recipients seeking to bring meaningful challenges to statutes and to regulations of questionable validity.

The more difficult and controversial decisions were the companion cases of *Cooper v. Swoap*²³⁵ and *Waits v. Swoap*,²³⁶ four to three decisions that involved administrative attempts to usurp the legislative function by ignoring the governing provisions of the Welfare Reform Act. These cases dealt with the administrative concept of deductible "noncash economic benefits," a concept that had been rejected by a unanimous court less than three months earlier in *California Welfare Rights Organization v. Brian*.²³⁷ In that case, in which Justice Tobriner did not participate, Justice Burke wrote the opinion for the court holding that the governing statutes could not reasonably be

233. *Id.* at 852 n.7, 523 P.2d at 688, 114 Cal. Rptr. at 648.

234. *Id.* at 851-52, 523 P.2d at 687-88, 114 Cal. Rptr. at 647-48.

235. 11 Cal. 3d 856, 524 P.2d 97, 115 Cal. Rptr. 1 (1974).

236. 11 Cal. 3d 887, 524 P.2d 117, 115 Cal. Rptr. 21 (1974).

237. 11 Cal. 3d 237, 520 P.2d 970, 113 Cal. Rptr. 154, *cert. denied*, 419 U.S. 1022 (1974).

interpreted to authorize a welfare regulation that reduced AFDC grants to expectant mothers on the rationale that the value of a pregnant woman's body represented deductible "income" to her fetus. The court summarized the issue in *Brian* as follows:

The regulation before us attempts to assess the value to an unborn child of the comforts he receives in his mother's womb. We think that, in the absence of express federal or state provisions on the subject, the instant regulation stretches the existing statutory concept of "income" or "resources" beyond the probable intent underlying those terms.²³⁸

The court reasoned that although HEW regulations permitted rather than required AFDC payments to pregnant mothers on behalf of their unborn children,²³⁹ California had a longstanding administrative policy of interpreting "needy children" to include a fetus.²⁴⁰ Because the Welfare Reform Act was silent on the subject, the court deemed the longstanding administrative policy to be "approved by the Legislature and representative of existing state law."²⁴¹ The department, relying solely upon federal and state provisions authorizing a grant reduction by the amount of nonexempt "income" or "resources" available to the AFDC recipient, had promulgated a regulation purporting to measure "in kind income" received by the fetus representing the value of the "resources" provided by the mother in the form of reduced needs for food, clothing, and shelter. This ingenious concept could claim no authorization from the California legislature, except from the general statutory provision, left unchanged by the Welfare Reform Act of 1971, defining "income" to include "the value of currently used resources."²⁴² The court concluded that "the Legislature in using the

238. *Id.* at 240, 520 P.2d at 972, 113 Cal. Rptr. at 156. In an article in the *California Journal* in October of 1971, when the law first went into effect, it was noted that the State Senate had charged the Welfare Department with violation of the Welfare Reform Act by, *inter alia*, contemplating the cutting off of welfare aid to expectant mothers who were contended to be eligible for assistance from the date of conception. The author of the article noted that "[t]his charge has provoked strong denials from department officials and increased efforts to bar release of regulations which are under study but which have not been approved by the director." 2 CAL. J. 273 (1971).

239. Subsequently, the United States Supreme Court held that fetuses were not included within the definition of children in the governing provisions of the Social Security Act but left open the question whether HEW otherwise had power to authorize matching grants to states choosing to include fetuses within their programs. *Burns v. Alcala*, 420 U.S. 575 (1975).

240. 11 Cal. 3d at 241, 520 P.2d at 972, 113 Cal. Rptr. at 156.

241. *Id.* at 243, 520 P.2d at 974, 113 Cal. Rptr. at 158.

242. CAL. WELF. & INST. CODE § 11008 (West 1972) (current version at CAL. WELF. & INST. CODE § 11008 (West Supp. 1977)).

general terms 'income' and 'resources' [was unlikely to have] intended those terms to be employed to exclude or reduce the AFDC grant to unborn children."²⁴³ The court was at pains to point out, however, that nothing prevented the legislature from reconsidering "the question whether, from a standpoint of policy, the grant to pregnant mothers should be terminated or reduced."²⁴⁴

After the unanimous decision in *Brian*, similar conclusions would seem to have been compelled in *Cooper* and *Waits*, which likewise involved unauthorized "in kind income" concepts. The result was not so straightforward. Although *Brian* had rested on the principle of prohibiting administrative usurpation of legislative power, the unanimity of the court was heavily influenced by the subject matter. The three justices who switched sides three months after *Brian* to dissent in *Cooper* and *Waits* apparently did so because the contrived reduction of AFDC grants to pregnant AFDC recipients had offended their sensibilities, but the regulations involved in *Cooper* and *Waits* comported with their own sense of reason. Only with difficulty can the conflicting positions taken by those justices in these three related cases be reconciled with any consistent legal principles. Yet, it is just such a principled approach that Justice Tobriner has continually worked to maintain in the area of public assistance laws, despite persistent attempts to politicize the court's decisions in this area.

Cooper v. Swoap

The regulations at issue in both *Cooper v. Swoap* and *Waits v. Swoap* were struck down on the ground that, without statutory authorization, they improperly reduced AFDC grants on the rationale that shared housing represented deductible "income." These regulations were also invalidated on the ground that deductions for presumed, rather than actual, income were in conflict with the governing provisions of the Social Security Act. *Cooper* involved a regulation that provided that, in situations in which one or more recipients of AFDC aid resided in the same household with one or more recipients of adult aid,²⁴⁵ "if the recipient's housing and utilities allowance exceeds his

243. 11 Cal. 3d at 243, 520 P.2d at 974, 113 Cal. Rptr. at 158.

244. *Id.* The continued validity of federal participation in payments provided by state programs for fetuses is unclear. See *Burns v. Alcala*, 420 U.S. 575 (1975). See note 258 *infra*.

245. The regulation at issue referred to the system of adult aid prior to 1974. When plaintiffs initiated the action, there were three "adult aid" programs in California: Aid to Totally Disabled (ATD), Aid to the Blind (AB), and Old Age Se-

share of the actual cost of housing and utilities (including telephone)[,] the excess shall be considered in-kind income and taken into consideration in computing the grant.”²⁴⁶ The resulting deduction for purported income generated by this shared living situation in fact did not measure “income” at all but the department’s approximation of the reduced need resulting from pooled living arrangements. The problem faced by the department, however, was that the express terms of section 11450 of the Welfare Reform Act of 1971 required the payment of a flat grant to recipient groups, depending on the size of the AFDC family, *without regard to need*. This flat grant system removed the authority previously delegated to the state Department of Welfare to determine need allowances.

What the department was attempting to do through regulations such as those at issue in *Brian*, *Cooper*, and *Waits* was to transmute its determination that certain AFDC recipients had less need than other AFDC recipients into a finding that such “reduced need” was deductible income. As Justice Tobriner observed in a footnote to his *Cooper* opinion, however, whether the economic benefits of shared housing could conceivably be characterized as “income” was not at issue.²⁴⁷ The question before the court, as in *Brian*, was far more limited: whether the legislature intended such “noncash economic benefits” to be considered as “income” deductible from the flat grant, pursuant to Welfare and Institutions Code section 11008. Not only was there no indication that the legislature had intended to expand the definition of income, upon enactment of the Welfare Reform Act of 1971,²⁴⁸ to include such benefits, there was every indication that it had not. Justice Tobriner reviewed the legislative history of the Welfare Reform Act and observed that the very regulation at issue in *Cooper* had been proposed by the administration during negotiation of the Act and had been decisively rejected by the legislature.²⁴⁹ He derived additional support for the finding that the regulation was incompatible with the legislation from the report of the subsequently

curity (OAS). As of January 1, 1974, these programs were superseded by the federally administered SSI program and the supplemental state program. See text accompanying notes 221-22 *supra*.

246. 11 Cal. 3d at 860 n.2, 524 P.2d at 99, 115 Cal. Rptr. at 3.

247. *Id.* at 868 n.16, 524 P.2d at 104, 115 Cal. Rptr. at 8.

248. Prior to the enactment of the 1971 Welfare Reform Act, section 11008 had never been interpreted as broadly as the department argued and section 11008 was re-enacted in 1971 without amendment. 11 Cal. 3d at 868, 524 P.2d at 104, 115 Cal. Rptr. at 8.

249. 11 Cal. 3d at 863-64 n.11, 524 P.2d at 101-02, 115 Cal. Rptr. at 5-6.

formed legislative subcommittee, which had specifically repudiated the regulation as an attempt "to usurp the Legislature's policy-making authority."²⁵⁰

In addition to finding that the regulation had been rejected in principle by the legislature, Justice Tobriner found it to be in direct conflict with former Welfare and Institutions Code section 11006,²⁵¹ which expressly mandated that "aid granted [to adult aid recipients] shall not be construed as income to any person other than the recipient."²⁵² By designating a portion of an adult aid recipient's housing benefits as "income" to AFDC recipients residing in the same household, the regulation contravened the statutory prohibition. Finally, going further than Justice Burke had done in *Brian*, Justice Tobriner concluded that even if the department had the power to define income to include "noncash economic benefits" never before considered income, it did not have the power to impute income based on arbitrary administrative allowance figures valuing these benefits. Rather, this procedure violated the governing provisions of the Social Security Act, which stated that only *actual* available income, and not presumed income, could be deducted from the recipient's grant.²⁵³

Justice Tobriner concluded his opinion with the observation that the department's attempt to justify its contrived and tortured concept of "income" reminded him of the "fanciful world of Lewis Carroll

250. *Id.* at 865 n.12, 524 P.2d at 102, 115 Cal. Rptr. at 6, quoting CAL. SENATE-ASSEMBLY SUBCOMMITTEE ON IMPLEMENTATION OF WELFARE REFORM, REPORT TO THE LEGISLATURE 20-21 (March 17, 1972). The Subcommittee's retroactive condemnation of the regulation would not in any way prohibit the court from reaching a different conclusion. Nonetheless, when viewed in conjunction with the refusal of the legislature to enact a similar provision into law just months earlier and with the contrary provisions of CAL. WELF. & INST. CODE § 11006 (West 1972) (current version at CAL. WELF. & INST. CODE § 11006 (West Supp. 1977)), and the new statutory prohibition against deducting from AFDC grants for reduced need, as opposed to actual receipt of income, it provides overwhelming evidence that the concept had indeed been rejected by the legislature.

251. 11 Cal. 3d at 869-70, 524 P.2d at 105, 115 Cal. Rptr. at 9.

252. CAL. WELF. & INST. CODE § 11006 (West 1972) (current version at CAL. WELF. & INST. CODE § 11006 (West Supp. 1977)).

253. 11 Cal. 3d at 870, 524 P.2d at 105-06, 115 Cal. Rptr. at 9-10, citing 42 U.S.C. § 602(a)(7). Although Justice Burke dissented in *Cooper*, he too was troubled by the sometimes absurd results achieved by the application of the department's allowance figures as a substitute for the determination of actual income received by an individual recipient. *Id.* at 876-77, 524 P.2d at 110, 115 Cal. Rptr. at 14 (Burke, J., dissenting). He would have therefore upheld the regulation on its face but restricted its application. *Id.* at 879, 524 P.2d at 112, 115 Cal. Rptr. at 16 (Burke, J., dissenting).

[where] the inhabitants could turn fact into fiction and fiction into fact by mere *ipse dixit*.”²⁵⁴ He then somberly warned:

“Through the Looking-Glass’ dealt with a fictional child. The tragedy of the instant case is that the department’s regulation, born of a fictional “allowance” construct, has brought all-too-real hardships to very real children. An administration of the welfare program that discards statutory mandate to reduce relief to the indigent young cannot be sustained. A society that sacrifices the health and well-being of its young upon the false altar of economy endangers its own future, and, indeed, its own survival.”²⁵⁵

The dissenting opinion of Justice Burke, joined by Justices Clark and McComb, was premised on the broad discretion granted by the legislature to establish regulations “not in conflict with the law.”²⁵⁶ In his view, the department had made a reasonable attempt to measure income, although in some instances the allowance figures would produce anomalous results and therefore could not be applied across the board.²⁵⁷ His views, and those expressed by Justice Clark²⁵⁸ in a separate dissenting opinion, are reminiscent of the court’s rationale for upholding the relative responsibility laws attacked in *Swoap* just months earlier.

What can explain the seemingly opposite positions taken by the court during such a short period? Apparently, the “income to the fetus” concept in *Brian* had offended the justices’ sensibilities. *Cooper*

254. *Id.* at 872, 524 P.2d at 107, 115 Cal. Rptr. at 11.

255. *Id.*

256. *Id.* at 873, 524 P.2d at 108, 115 Cal. Rptr. at 12 (Burke, J., dissenting). The majority’s answer to Burke’s objections was a reference to the checks and balances of our democratic system; a legislature passes laws, an administrative body implements laws by appropriate regulations and the courts sit in review to determine whether the administrative agency is in fact complying with legislative mandate. Thus, it is the court’s interpretation of the legislature’s definition of income that is controlling and not that of the Department of Social Welfare. *Id.* at 864, 524 P.2d at 102, 115 Cal. Rptr. at 6.

257. See note 253 *supra*.

258. Justice Clark characterized the issue as deductibility of “free housing.” *Id.* at 879-80, 524 P.2d at 112, 115 Cal. Rptr. at 16 (Clark, J., dissenting). The majority did not quarrel with the characterization of free housing as deductible in kind income as contemplated by CAL. WELF. & INST. CODE § 11009.1 (West 1972). Rather, it pointed out that a shared living arrangement did not constitute partially free housing any more than would an inexpensive independent living arrangement. It is merely one method of economizing on housing, allowing recipients to allocate more of their limited grant to other less flexible needs. The regulation at issue impermissibly characterized this savings as “deductible income.”

In fact, the regulation did not even consistently determine income from shared living arrangements. Only if the recipient’s pro rata share of housing and utilities exceeded an administrative “allowance” was income deemed generated. 11 Cal. 3d at 863, 871 n.19, 524 P.2d at 101, 106-07, 115 Cal. Rptr. at 5, 10-11. Thus, the

can be distinguished from *Swoap* because it involved a specific statutory protection for recipients of aid to the totally disabled that prevented construction of the grant as income to anyone else. The resurrected AFDC housing allowance had been found to be just an administrative attempt to construe ATD grant money as "income" to AFDC recipients owing to the "shared living arrangement," in direct conflict with Welfare and Institutions Code section 11006.

Waits, on the other hand, had neither of these aspects. Although it also involved an imputation of in kind income from a shared living arrangement, the AFDC recipients affected were not children with a mother who was also disabled and therefore eligible for ATD, as in *Cooper*, but children who resided with "non-needy" relatives. Thus the *Waits* regulation embodied a form of relative responsibility similar to the statutory provisions upheld six months earlier in *Swoap*. Why, then, was Justice Tobriner able to convince a majority to condemn the *Waits* regulation? The difference would appear to be that, although a majority of the court felt compelled to dilute the principles it had established in *Kirchner* and *Boss* in the face of strong legislative opposition, deference to a coequal branch on a controversial issue is far different from acquiescence in an administrative body's arrogation of legislative power.

Waits v. Swoap

The challenged regulation in *Waits* provided that "non-needy" relatives would be conclusively presumed to have contributed income in the form of housing and utility benefits to AFDC children in their care to the extent that the department allowance for housing and utilities exceeded any increased costs attributable to the child's presence in the home. Relying upon the same analysis used in *Cooper*, Justice Tobriner found that the characterization of shared housing as income to the recipient was completely at odds with the flat grant system effected by the Welfare Reform Act of 1971. The concept involved

more expensive the shared living arrangement, the less income. In *Cooper*, for example, the department determined that the children derived \$31.00 of income by reason of their mother's payment of \$14.00 as her pro rata share of housing expenses. This resulted from subtracting the children's \$70.00 pro rata share of housing (2/3 of \$84.00) from the unauthorized administrative housing allowance for five children (\$101.00). If the Cooper family had instead paid \$60.00 for housing expenses, the formula would find that the children "received" \$50.00 in income generated from the mother's pro rata contribution of \$10.00! On the other hand, if housing expenses for the entire Cooper family were \$122.00 or more, application of the administrative formula would result in a determination that no income had been generated by the shared living arrangement.

in the *Waits* regulation had apparently not been considered by the legislature prior to passage of the Act, but, as was true of the regulation in *Cooper*, the legislative subcommittee that oversaw implementation of the Act had specifically repudiated the regulation at issue in *Waits*.²⁵⁹ Justice Tobriner likewise found the regulation to be "simply another variation on the department's 'noncash economic benefit' theme," which attempted to circumvent the flat grant mandated by the legislature by transmuted its determination of the recipient's reduced needs into deductible income.²⁶⁰ He pointed out that shared housing had "never been considered deductible 'income' throughout the entire history of California welfare programs, and nothing in the 1971 Welfare legislation indicated that the Legislature intended to change that approach."²⁶¹

Although thus far it paralleled *Cooper* and *Brian*, *Waits* rested on a second rationale that had been unsuccessfully argued in *Swoap*. The departmental regulation conclusively presumed a gift of housing by nonneedy relatives to the AFDC children in their care, in effect creating a duty of partial support premised on the acceptance of AFDC children in their homes. The relatives covered by the regulations²⁶² were persons who otherwise had no legal duty to support the children whom they took into their homes. Justice Tobriner distinguished the situation presented by a relative who donates free housing and utilities to an AFDC recipient from a relative who is either unwilling or unable to donate any such "income." This issue had been aptly framed by a federal court in invalidating a similar administrative practice:

[W]hether the relationship is one of stepfather, relative, or total stranger, [t]he test is simply whether the substitute parent is *required by state law* to furnish the support; if he is not, then the state may not, solely by virtue of the substitute parent relationship, *assume* a contribution to the child's support by some presumption of availability of income.²⁶³

Thus, like the MARS provisions invalidated by the United States Supreme Court in *King v. Smith*²⁶⁴ and *Lewis v. Martin*,²⁶⁵ the instant

259. See note 250 *supra*.

260. *Waits v. Swoap*, 11 Cal. 3d 887, 892, 524 P.2d 117, 119, 115 Cal. Rptr. 21, 23 (1974).

261. *Id.* at 893, 524 P.2d at 120, 115 Cal. Rptr. at 24.

262. The class of relatives affected by the regulation are grandparents, uncles, aunts or other close relatives other than parents. See former State Dep't of Social Welfare, Reg. 44-115.6 (1971).

263. *Jenkins v. Georges*, 312 F. Supp. 289, 292 (W.D. Pa. 1969) (emphasis added).

264. 392 U.S. 309 (1968). See text accompanying notes 114-15 *supra*.

265. 397 U.S. 552 (1970). See text accompanying notes 114-15 *supra*.

regulation impermissibly assumed the availability of income to the AFDC children that they might well not have received.²⁶⁶

In addition, not only did the regulation deduct for housing that the relative involved might be unable to supply, but also it assigned value to the housing that had nothing to do with the actual housing situation in which the children found themselves. Thus, even if living accommodations were cramped and an AFDC child slept in the living room, the regulation presumed that "a spare room" had been provided and assigned a value of \$67 to the gift of a "spare room."²⁶⁷

The consequence of such a regulation was that some AFDC grants were indeed reduced by foisting part of the children's expenses onto their relatives. Because the duty of partial support lasted only as long as the AFDC child stayed in the home, the regulation produced growing economic pressure on marginal families, such as the Waits, to send the children to a foster home, which would have cost the state more and provided the children with a less desirable living arrangement.²⁶⁸ Just as the statute considered in *Conover v. Hall* had thwarted the basic congressional policy of encouraging welfare recipients to become self-sustaining through employment, the instant regulation thwarted another basic purpose of the AFDC program — "encouraging the care of dependent children in their own homes or in the homes of relatives."²⁶⁹

As in the *Cooper* opinion, Justice Tobriner closed with an evocative summation of the administrative tactics:

In promulgating this unauthorized measure, the department is in reality gambling that close relatives acting as caretakers will feel a moral obligation to keep an AFDC child even though the child can no longer contribute the AFDC grant which the Legislature

266. The plaintiffs in *Waits* exemplified the all-too-frequent inaccuracy of the presumption. Mr. and Mrs. Waits had six AFDC children in their care; three were grandchildren and three great-grandchildren. The couple's combined total income from social security benefits and a pension was less than \$5,000 annually, but they were "nonneedy" because they did not personally qualify for any categorical aid programs. Because of the substantial reduction in the children's flat grant brought about by the presumed gift of housing, the family was no longer getting enough to eat and was unable to clothe the children properly. Affidavits to this effect accompanied the plaintiffs' complaint. 11 Cal. 3d at 891 n.2, 524 P.2d at 118-19, 115 Cal. Rptr. at 22-23.

267. *Id.* at 894, 524 P.2d at 121, 115 Cal. Rptr. at 25.

268. *Id.* at 895-96 n.8, 524 P.2d at 122, 115 Cal. Rptr. at 26, citing testimony of Mrs. Mary Charles of the Santa Clara County Department of Social Services at the Assembly Welfare Committee Hearing on Foster Care 46-47 (Sept. 7, 1972).

269. 42 U.S.C. § 601 (1971); see CAL. WELF. & INST. CODE § 11205 (West 1972).

guaranteed. If the department "wins" its gamble, the state will save money but only at the expense of depriving children of essential need items and subjecting their generous relatives to unwarranted hardships. If the department loses its gamble, as is all too possible, the children will lose the close family environment sought to be achieved by the act and the state will have to pay the higher cost of foster care.

In essence, the department has so enmeshed itself in fictitious and misleading labels for the sake of reducing welfare costs that it has obfuscated the purpose of the underlying statute: the preservation, so far as possible, of the family unit, and the more fundamental purpose of the preservation of the health of the state's children, the potential leaders of tomorrow.²⁷⁰

A dissent by Justice Burke, joined by Justice McComb, and a separate dissent by Justice Clark, substantially reiterated their positions in *Cooper* but added as support an HEW letter approving the regulations at issue as being in conformance with federal law.²⁷¹ Particularly noteworthy was Justice Burke's acceptance of the regulation's premise that AFDC children "commonly reside in a spare, unused room in the home." In his view, any exception was accommodated by a corollary provision for reimbursement for out-of-pocket expenses proved to have been incurred as a result of the child's presence in the home.²⁷² Justice Tobriner answered this argument in a footnote, observing that "[w]hile the 'credit' given for actual out-of-pocket expenses would in some cases ameliorate the harshness of the regulation's effect, such credit would in no way cure the regulation's fundamental defects."²⁷³

In later cases, the court confirmed its intention to continue to play an active role in the protection of welfare recipients' rights. Thus, in 1976 it ruled that the independent judgment standard of review, *trial de novo*, must be applied in administrative mandamus

270. 11 Cal. 3d at 895-96, 524 P.2d at 121-22, 115 Cal. Rptr. at 25-26 (footnote omitted).

271. *Id.* at 898 n.1, 524 P.2d at 123, 115 Cal. Rptr. at 27 (Burke, J., dissenting). Although the court had rejected HEW's position in *Villa*, HEW's views were generally deemed subject to considerable deference by the court. Of course, the primary ground for invalidating the regulations at issue in *Watts* was that they conflicted with a state law, an issue upon which HEW obviously had not passed.

272. *Id.* at 897, 899, 524 P.2d at 122, 124, 115 Cal. Rptr. at 26, 28.

273. *Id.* at 894-95 n.7, 524 P.2d at 121, 115 Cal. Rptr. at 25. Justice Tobriner's position is ironically illustrated by the very example cited by Justice Burke in dissent. If "the spare room presumption" proved invalid and the family were forced to move to larger quarters to accommodate AFDC children, the logical result would be that the presumed "income" from the gift of a spare room would no longer be deemed applicable. Instead, the regulation would still be applied to produce a cut in the recipient's grant owing to the value assigned to the nonexistent spare room.

actions challenging the termination of welfare assistance.²⁷⁴ Stating the views of six members of the court, Justice Richardson concluded that "the right to continued welfare benefits, for purposes of judicial review of welfare decisions, is both 'fundamental' and 'vested'. . . ." ²⁷⁵ Soon thereafter, the court ruled five to two that an applicant who successfully challenges an administrative denial of benefits may be awarded retroactive benefits and prejudgment interest²⁷⁶ as well as the statutory award of attorneys' fees and court costs.²⁷⁷

Recognition of the rights of welfare recipients, however, has been tempered by recognition of the limitations of judicial enforcement mechanisms. This institutional constraint is demonstrated in the recent decision of *In re Sands*,²⁷⁸ in which the court denied a writ of habeas corpus filed by a woman convicted of obtaining AFDC aid by means of false statements. The petitioner argued that the conviction had to be overturned because the state failed to follow statutory requirements that it seek restitution prior to instituting a criminal fraud action against her.²⁷⁹ The court assumed for the sake of argument that seeking restitution was a mandatory statutory requirement, rather than merely a directive, and that a criminal prosecution would therefore be barred because of the state's failure to follow required procedures. Nevertheless, in an opinion by Justice Tobriner, expressing the unanimous view of the court, it was held that failure of the state to comply with the statutory requirements did not constitute a fundamental defect in the criminal proceeding, which would have exposed the conviction to collateral attack on habeas corpus, because restitution was not a defense to the charged crime.

The holding is limited to the ruling that for purposes of post-conviction habeas corpus proceedings, no fundamental jurisdictional defect had been stated by the alleged failure of the state to seek reimbursement. In dicta, Justice Tobriner indicated: "It may be . . . that construing the restitution requirement as mandatory is desirable to ensure that *in future cases* prosecutors will seek restitution before filing criminal complaints, thus furthering the legislative goals of

274. *Harlow v. Carleson*, 16 Cal. 3d 731, 548 P.2d 698, 129 Cal. Rptr. 298 (1976). See the companion case of *LeBlanc v. Swoap*, 16 Cal. 3d 741, 548 P.2d 704, 129 Cal. Rptr. 304 (1976).

275. 16 Cal. 3d at 734, 548 P.2d at 700, 129 Cal. Rptr. at 300.

276. *Tripp v. Swoap*, 17 Cal. 3d 671, 552 P.2d 749, 131 Cal. Rptr. 789 (1976). Justice Sullivan wrote the opinion. Justice Clark, joined by Justice McComb, dissented.

277. *Id.*; see CAL. WELF. & INST. CODE § 10962 (West 1972).

278. 18 Cal. 3d 851, 558 P.2d 863, 135 Cal. Rptr. 777 (1977).

279. CAL. WELF. & INST. CODE § 11483 (West 1972) (current version at CAL. WELF. & INST. CODE § 13200 (West 73B Supp. 1977)).

safeguarding public funds and protecting the interest of dependent children."²⁸⁰

Here again, he employed dicta as a vehicle to convey a message on the proper implementation of welfare laws. Prosecutors have thus been forewarned that they could face possible reversal of future welfare fraud convictions if they do not demand restitution prior to instituting criminal proceedings. In this manner he again reminds the executive branch that although its position is upheld in the instant case, statutory public assistance provisions are not to be ignored or followed at whim. If necessary, the judiciary will act to ensure that the legislative objective is accomplished.

Conclusion

Although some commentators extol the "passive virtues" of the court,²⁸¹ Justice Tobriner is an unabashed judicial activist.²⁸² He has fought to establish the obligation of society to provide public assistance to its indigent and to ensure that public assistance programs are carried out in an evenhanded manner and with proper regard for the human dignity of public assistance recipients and their families.

The late Professor Bickel described the court as a countermajoritarian force in an otherwise democratic society that, for that reason, must exercise its powers with restraint.²⁸³ Justice Tobriner recognizes the countermajoritarian position of the court and welcomes the opportunity to prevent abuse of majoritarian power. His criticism echoes that of Charles Reich: "The great error of the public interest state is that it assumes an identity between the public interest and the interest of the majority. . . . [T]he government should gain no power as against constitutional limitations by reason of its role as a dispenser of wealth."²⁸⁴

In enacting the Welfare Reform Act, with some provisions of questionable validity, the Democratic leadership in the legislature knowingly passed the buck to the courts.²⁸⁵ The determination of

280. 18 Cal. 3d at 858-59, 558 P.2d at 867, 135 Cal. Rptr. at 781 (emphasis added).

281. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

282. See *Guerrero v. Carleson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973); *Swoap v. Superior Court*, 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973). See text accompanying notes 97-113 & 190-220 *supra*.

283. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 51-58 (1961).

284. Reich, *The New Property*, 73 YALE L.J. 733, 774 (1964).

285. See note 174 *supra*.

the validity of legislative and administrative actions, however, is not just the province of the courts. It is the province also of every citizen called upon to execute questionable directives; it is the province of administrators and prosecutors in faithfully carrying out their statutory duties and the province of conscientious legislators,²⁸⁶ who in the first instance must pass upon the constitutionality of action that they propose to take.

Only because the other branches failed to undertake their constitutional and statutory responsibilities was the judiciary confronted with the legal problems posed by the cases discussed herein. Only because there are justices like Justice Tobriner, whose principles do not yield in the face of strong political pressure, have the poor gained recognition in the courts as more than mere political pawns.

In fact with the recent reassertion of wealth as a suspect classification under the state constitution,²⁸⁷ the California Supreme Court may soon declare: "[T]he mere state of being without funds is a neutral fact — constitutionally an irrelevance' [and] classifications based on poverty and handicap are measured by equal protection standards of constitutional purpose and proper classification"²⁸⁸

More than eighty years ago in *Plessy v. Ferguson*, the first Justice Harlan, dissenting, said that the constitution is color-blind.²⁸⁹ It was not until *Brown v. Board of Education*,²⁹⁰ in which the court held that classifications based on race are suspect, that his dissent was vindicated. If Justice Tobriner's conception of wealth as a suspect classification is accepted in the near future, he may have the satisfaction, denied Justice Harlan in *Plessy*, of seeing his dissent in *Swoap* vindicated in his own lifetime. Much of the groundwork has already been laid. The proximity of the goal attests in large measure to the zeal with which Justice Tobriner has sought to protect the constitutional and statutory rights of welfare recipients and demonstrates the strength of his underlying conviction that he is merely articulating the duty of society to its indigent and, more broadly, the duty of society to itself to safeguard its own future.

286. See Brest, *The Conscientious Legislator's Guide to Constitutional Implementation*, 27 STAN. L. REV. 585 (1975).

287. *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

288. *California's Dual System of Family Law*, *supra* note 12, at 682. The adoption of wealth as a suspect classification does not automatically extend to Professor tenBroek's position. See the differing analyses of the majority and dissent in *Swoap v. Superior Court*, 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 201 (1973).

289. 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

290. 347 U.S. 483 (1954).

